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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

ZIMMERN BEHARRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, in light of this Court's ruling in ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), and/or ***Jones v. United States***, 526 U.S. 277 (1999), the Petitioner was properly sentenced to life imprisonment where:

A. The drug quantity was neither presented to the Grand Jury, charged in the indictment, nor submitted to the petit jury to be found beyond reasonable doubt thus depriving the sentencing court of a jurisdictional framework with which to sentence the defendant to more than the maximum of 20 years provided by the respective default provisions of 21 U.S.C. §§ 841(b)(1)(C) or 960(b)(3)?

B. The Petitioner was indicted and convicted of violating 21 U.S.C. §841(a)(1), and 21 U.S.C. §952(a), with no mention or notice of quantity, but was sentenced for different, additional and uncharged drug importation, possession and distribution offenses in excess of 5 kilograms of cocaine in violation of 21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1)(B)?

C. The Eleventh Circuit's strict application of the substantial prejudice prong in "plain error" review of ***Apprendi*** issues in *pre-**Apprendi*** cases, conflicts with a majority of the Circuit Court's of Appeal, and violated the Petitioner's due process rights where the Petitioner lodged general and specific objections at sentencing to the trial court basing his sentence upon drug quantities not charged in the Indictment or found by the jury beyond a reasonable doubt?

D. The sentencing court, over defense counsel's expressed objections, attributed to Petitioner drug quantities beyond the two events for which Petitioner was convicted, and where some the additional quantities were alleged to be part of a

broad conspiracy on which the jury did not reach a verdict, and some were from alleged importations outside the time period of the charged conspiracy?

E. The Eleventh Circuit's use of counsel's alternative argument at sentencing as a basis for affirming the Petitioner's sentence and conviction violates due process where such arguments were presented merely to rebut the Government's position and trial court's rulings that uncharged drug quantities be attributed to the Petitioner to increase his sentencing exposure?

II. Whether the trial court erred when it *Allen* charged the jury after the jury informed the court that they were deadlocked after reaching a verdict on one count, that such a deadlock was unanimous, and one juror had previously requested a bailiff because she feared for her safety due to the conduct of the other jurors?

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A. The drug quantity was neither presented to the Grand Jury, charged in the indictment, nor submitted to the petit jury to be found beyond reasonable doubt thus depriving the sentencing court of a jurisdictional framework with which to sentence the defendant to more than the maximum of 20 years provided by the respective default provisions of 21 U.S.C. §§ 841(b)(1)(C) or 960(b)(3). Amount of drugs that a defendant intended to conspire and/or possess with

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OPINIONS BELOW

The unpublished *per curiam* opinion of the Eleventh Circuit affirming Petitioner's conviction was entered on July 6, 2001. ***United States v. Beharry***, 265 F.3d 1062 (11th Cir.(Fla.))(Table, No. 00-11371). (Pet.App. "1" at 22-30). The Eleventh Circuit's unpublished order denying Petitioner's Motion for Rehearing *en banc* was entered on October 22, 2001, ***United States v. Beharry,*** — F.3d —(11th Cir.(Fla.))(Table, No. 00-11371-JJ), and the Eleventh Circuit's mandate issued on October 30, 2001). (Pet.App. "1" at 59-61)

The appeal to the Eleventh Circuit arose from Petitioner's Judgment and Commitment entered on March 13, 2000, after a jury trial. (Pet.App. "1" at 8-21).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh was entered on July 6, 2001. A timely Petition for Rehearing and Rehearing *En Banc* was filed on September 14, 2001, and on October 22, 2001, the Eleventh Circuit entered an order denying said Petition. (Pet.App. "1" at 60). Thereafter, on October 30, 2001, the Eleventh Circuit issued a Mandate on its Judgment. (Pet.App."1" at 61). The jurisdiction of this Court to review a the judgment of the Eleventh Circuit is conferred under Title 28 U.S.C. § 1254(1) and Sup.Ct.Rule 10.

CONSTITUTIONAL PROVISIONS & STATUTES

U. S. Const., amend V

All Constitutional Provisions and Statutes are set forth in Appendix "1."

IN THE
SUPREME COURT OF THE UNITED STATES
No. _____

ZIMMERN BEHARRY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Zimmern Beharry, Defendant and Appellant in the courts below, respectfully petitions for a writ of certiorari to review the Judgment of the United States Court of Appeal for the Eleventh Circuit entered in this case on March 11, 2000, and Order entered on October 22, 2001, denying his Petition for Rehearing and Suggestion for Rehearing *En Banc*. In his appeal to the Eleventh Circuit, *Zimmern Beharry* specifically argued that the quantity of drugs attributed to him violated ***Apprendi v. New Jersey,*** 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and/or ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).(See, i.e., Pet. App. "1" at 38-61).

STATEMENT OF THE CASE

Zimmern Beharry was initially indicted on ten counts of various narcotics trafficking offenses. Specifically, Mr. Beharry was charged with conspiracy with intent to possess and import cocaine into the United States and various importations and possession counts related to the conspiracy. All of the counts referred to "a mixture or substance containing a detectable amount of cocaine." Thereafter, the Government sought to extradite Mr. Beharry from the Republic of Trinidad-Tobago. Significantly, the Court in Trinidad did not merely rubber-stamp the United States' extradition request. Instead, the Trinidadian Court refused to extradite on counts nine and

ten, finding insufficient evidence to support those counts.[1]

Before trial, the district court (Hurley, J.) dismissed without prejudice two of the remaining eight counts on venue grounds (Indictment Counts 2 & 6). Petitioner proceeded to trial on the remaining six counts which were renumbered as follows: (1) conspiring to import cocaine into the United States from September 1, 1993, to February 10, 1994, in violation of 21 U.S.C. §§ 952(a), 963; (2) importing cocaine into the United States on February 2, 1994, in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 2; (3) importing cocaine into the United States on February 10, 1994, in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 2; (4) conspiracy to possess cocaine from September 1, 1993, to February 10, 1994, in violation of 21 U.S.C. § 846; (5) possession of cocaine on February 2, 1994, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. § 2; and (6) possession of cocaine on February 10, 1994, in violation of 21 U.S.C. § 842(a)(1) and 18 U.S.C. § 2. None of these charges alleged a specific quantity of cocaine.

Significantly, at trial during the cross examination of DEA Special Agent Edward Duffy, it was discovered that he (Agent Duffy), Special Agent Mancini and AUSA Boma had submitted knowingly false affidavits, regarding the existence of a confidential informant, in support of Mr. Beharry's extradition to the Trinidadian Court. Moreover, such knowingly false information was also submitted by way of testimony in open court at a related federal trial and to the respective grand juries.

After a jury trial in which Mr. Beharry contested his involvement in *any* drug related activity, and in which the issue of quantity of cocaine with respect to which Mr. Beharry was criminally liable was not submitted to the jury for its unanimous, beyond a reasonable doubt determination, Mr. Beharry was found guilty of the two possession and two importation counts stemming specifically and wholly from the September 2, 1994, and September 10, 1994, incidents. Specifically, the jury found Mr. Beharry guilty of Counts

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[1]The counts as listed on the jury's sheet (R-514) and the judgment of conviction (Pet. App. "1" at 8-21) are numbered differently from the counts in the fifth superseding indictment (R-179).

2, 3, 5, and 6, and was unable to reach a verdict on both of the substantive and broader conspiracy charges of Counts 1 and 4.[2]

Prior to returning the verdicts, on Friday, October 29, 1999, after three and half days of deliberations, the district court received several notes from the jury. The first note stated that "we have considered only one count and we are stuck." (R-585-2810). The second note stated that Juror 8 "does not feel safe in the jury room" and needed the bailiff. (R-585-2810). Thereafter, the district judge spoke to Juror 8 (Carol Best) out of the presence of the other jurors during which Ms. Best expressed fear for her physical safety and that she believed the confrontations "could move to something more physical." (R-585-2834-36). The district court decided to adjourn until Monday, November 1, 1999, hoping to give the jurors a time to cool-off. (R-585-2838). The district court also cautioned jurors to be civil to one another during deliberations. (R-585-2840).

Thereafter, on Monday, November 1, 1999, the jury resumed deliberations. The District Court then received a note stating that "we are unanimous on Count 5, we are hung on Counts 2, 3, 4, and 6, and feel we cannot make anymore progress, this is unanimous. (R-586-2846). Thereupon, over defense counsel's objection that it would be unduly coercive and single out juror 8, the district court gave the jury a modified *Allen* charge. (R-586-2856-57). The district court denied the defense motion for a mistrial. (R-586-2867). The jury returned the guilty verdicts on Counts 2, 3, 5, and 6 later that same day.

At sentencing, over defense counsel's expressed and specific objection, the court held Mr. Beharry responsible for a total of 263 kilograms of cocaine making the Guideline base level 38. The district court found this drug quantity by a preponderance of the evidence. To arrive at this amount, the court found Mr. Beharry liable for additional 217 kilograms of cocaine beyond the two importation and possession counts for which he was found guilty. Moreover, Petitioner's sentencing liability extended beyond the scope of the broader conspiracy counts for which he was extradited.

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[2]These remaining counts were later dismissed. (R-549, 554).

Based upon these findings, Mr. Beharry was sentenced to life in prison notwithstanding the indictment's failure to charge him specifically with any particular quantity of cocaine and the failure of the district court to submit the quantity issue to the jury for its determination beyond a reasonable doubt. Although, Mr. Beharry's sentencing was conducted on March 10, 1999, prior to this Court's opinions in ***Jones v. United States,*** 526 U.S. 227 (1999); ***Castillo v. United States,*** 530 U.S. 120 (2000); and ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000), defense counsel did raise objections during the sentencing proceedings to the trial court's sentencing Mr. Beharry for drug quantities with which he was not charged by the grand jury or convicted by the petit jury.

ARGUMENTS

I. IN LIGHT OF THIS COURT'S RULING IN *APPRENDI vs. NEW JERSEY,* 530 U.S. 466 (2000), AND/OR *JONES vs. UNITED STATES,* 526 U.S. 277 (1999), THE PETITIONER WAS IMPROPERLY SENTENCED TO LIFE IMPRISONMENT WHERE:

A. The drug quantity was neither presented to the Grand Jury, charged in the indictment, nor submitted to the petit jury to be found beyond reasonable doubt thus depriving the sentencing court of a jurisdictional framework with which to sentence the defendant to more than the maximum of 20 years provided by the respective default provisions of 21 U.S.C. §§ 841(b)(1)(C) or 960(b)(3).

B. The Petitioner was indicted and convicted of violating 21 U.S.C. §841(a)(1), and 21 U.S.C. §952(a), with no mention or notice of quantity, but was sentenced for different, additional and uncharged drug importation, possession and distribution offenses in excess of 5 kilograms of cocaine in violation of 21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1)(B).

In ***Apprendi***, this Court established a rule of Constitutional law of general applicability, mandated by the Due Process Clause of the Fifth Amendment and by the notice and jury trial guarantees of the Sixth Amendment: "[A]ny fact (other than a prior conviction)

that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 476, *quoting* ***Jones,*** 526 U.S. at 243, n. 6. At issue in ***Apprendi*** was a New Jersey "hate crime" statute, which provided for an enhanced term of imprisonment if a trial judge found by a preponderance of the evidence that the defendant committed the underlying crime. This Court framed the question presented as: "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt?" ***Apprendi,*** 530 U.S. at 469. The Court's analysis drew upon rules of criminal practice and procedure existing at the time the Constitution and the Bill of Rights were drafted, with particular emphasis on the role of the indictment in constraining the trial court's sentencing powers. The Court noted that "[a]ny possible distinction between an 'element' of a felony and a 'sentencing' factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by the court as it existed during the years surrounding our nation's founding." ***Apprendi,*** 530 U.S. at 478. At common law, the Court continued:

> [j]ust as the circumstances of the crime and the intent of the defendant at the time of the commission were often essential elements to be alleged in the indictment, *so too were the circumstances mandating a particular punishment. "Where a statute annexes a higher degree of punishment to a common law felony, if committed under particular circumstances, an indictment for the offense, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision."*

Id. at 480, (internal citations omitted)(emphasis added). This history, the Court concluded, "point[s] to a single, consistent conclusion:"

> The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition "elements" of a separate legal offense.

Id. at 483, n. 10 (emphasis added). *See also id.* at 499 (Scalia, J., concurring)("all facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by a jury")(emphasis in original). *Id.* at 501 (Thomas, J., concurring)("One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element").

The applicability of ***Apprendi*** to the instant case is clear. The counts upon which Mr. Beharry was found guilty referenced only a "detectable amount of cocaine." No drug quantity was alleged in the indictment other than "a detectable amount of cocaine." *Not one* overt act listed any quantity of drugs. Moreover, the issue of quantity of drugs was never submitted to the jury. In the context of §§ 841 and 960, where the quantity of drugs are not charged in the indictment, a defendant has not been charged with a crime punishable under §§ 841(b)(1)(B), or under 960(b)(1)(B), (b)(2)(B). It follows, therefore, that the Petitioner cannot constitutionally be sentenced to more than the maximum of 20 years provided in the respective default provisions of those statutes, §§ 841(b)(1)(C) or 960(b)(3), which do not require any particular amount of controlled substance to be charged or proven. Where the indictment alleges only the lesser offense, sentencing Mr. Beharry for the uncharged, greater offenses, was effectively a constructive amendment of the indictment, which under ***Ex Parte Bain,*** 121U.S.1(1887)[3], ***Stirone v. United States,*** 361 U.S. 212 (1960)[4], and ***Russell v. United States,***

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[3]The failure of the Grand Jury to charge the defendant with the elements of an offense is a jurisdictional bar to prosecution for that offense which has been settled by this Court since its decision in ***Bain:*** an indictment found by the grand jury is "indispensable to the power of the court to try the petitioner for the crime with which he is charged." *Id.* 121 U.S. at 12.

[4]This Court explicitly reaffirmed ***Bain*** in ***Stirone***, explaining that the very purpose of the Fifth Amendment grand jury clause was to limit a defendant's "jeopardy to offenses charged by a group of his fellow citizens acting independently of either the prosecuting attorney or judge." *Id.* at 218. Here, the Court concluded that the deprivation of the defendant's "substantial right to be tried only on charges presented in an indictment returned by a grand jury...is far too serious to be...dismissed as harmless error." *Id.* at 217.

369 U.S. 749 (1960)[5] *is forbidden.*[6] Mr. Beharry was therefore sentenced to life imprisonment on these counts in violation of the due process and grand jury clauses of the Fifth Amendment and of the jury trial guarantee of the Sixth Amendment. These constitutional violations require reversal of Mr. Beharry's conviction without a showing of prejudice. *See* ***Stirone*** at 217.

C. The Eleventh Circuit's strict application of the substantial prejudice prong in "plain error" review of *Apprendi* issues in *pre-Apprendi* cases, conflicts with a majority of the Circuit Court's of Appeal, and violated the Petitioner's due process rights where the Petitioner lodged general and specific objections at sentencing to the trial court basing his sentence upon drug quantities not charged in the Indictment or found by the jury beyond a reasonable doubt.

The Eleventh Circuit recently acknowledged that it has not yet found any ***Apprendi*** error to fit within the scope of the plain error doctrine, and that in order for an ***Apprendi*** error to be preserved in a *pre-**Apprendi*** case, counsel's objections at sentencing must mirror this Court's ***Apprendi*** decision, even if such argument ran counter to circuit precedent at the time. See, ***United States v. Ardley,*** 273 F.3d 991, 992, 996 (11th Cir. 2001).

In the case *sub judice,* defense counsel repeatedly objected during all proceedings to the trial court's imputation of drug quantities. Among the numerous objections which counsel raised

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[5]The principle of ***Bain*** and ***Stirone***—that an indictment charging all of the essential elements is a prerequisite to conviction for that offense—was again reaffirmed in ***Russell*** at 764-65 ("an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, *unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense to be punished;*")(internal citations omitted, emphasis added). This principle was reaffirmed in ***Apprendi*** itself: "[t]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury." *Id.* 530 U.S. at 483, n. 10.

[6]It is a "well settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." ***Russell v. United States,*** 369 U.S. 749, 770 (1962), *citing* ***Bain*** at 10, ***United States v. Norris,*** 281 U.S. 619, 622 (1930), *and* ***Stirone*** at 218.

regarding drug quantities, prior to, and at sentencing,[7] defense counsel affirmatively and specifically objected to drug amounts not stated in the indictment or submitted to the jury as follows:

> ...we say the findings that the Court made regarding the amounts of cocaine that were not presented at the trial or *in the indictment* cannot be used as relevant conduct, and thereby cannot be used to increase the guideline level.

(Emphasis added)(R-587-2959).

> [R]egarding [testimony presented at sentencing]...it is testimony that was not presented at trial, thereby, Mr. Beharry did not obtain *Fifth and Sixth Amendment rights that he normally would in a trial,* but now is coming in to add on many years to his sentence...I would submit...that the Government must prove this by clear and convincing evidence.

(Emphasis added)(R-587-2947-48).

The above pre-***Apprendi*** objections were sufficient to notify the lower court that the Petitioner objected to all drug quantities that were not charged in the indictment and not found by the petit jury beyond a reasonable doubt.[8] The objection preserved the error as to the precise legal analysis required under ***Apprendi***. To assume otherwise places an impermissible burden on a defendant. *See* ***United States v. Thomas,*** 429 F.2d 407, 408 (5th Cir. 1970), *per curiam* (holding that "[a]n appellate court will not review actions of omission or commission by a trial court unless the defendant makes

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[7]A constitutional objection for ***Apprendi*** purposes is timely if a defendant makes the objection at sentencing. *See* ***United States v. Smith,*** 240 F.3d 927, 929 (11th Cir. 2001). *See also* ***United States v. Garcia-Guizar,*** 234 F.3d 483, 488 (9th Cir. 2000)(reviewing defendant's sentence under preserved error review where the defendant "argued in his sentencing memorandum that the amount of drugs for which he was to be sentenced had to be pleaded [in the indictment] and found by a jury beyond a reasonable doubt").

[8]The trial and sentencing proceedings in the instant case took place *before* ***Apprendi*** was decided and thus, defense counsel was bound by Eleventh Circuit precedent which would have made a request that the jury determine drug quantity specious.

known to the court the action which he desires the court to take and the grounds therefore").[9] In ***Thomas,*** trial counsel failed to make any objection to the trial court's ruling regarding an issue arising during direct examination. While a specific objection may be necessary to preserve an objection to evidentiary issues, *see* Fed.R.Evid. 103(a)(1), a general objection should generally suffice to preserve error relating to the sufficiency of the evidence, *see* Fed.R.Crim.P. 29 & 47. As specificity is not required by Rule 29 or by Rule 47, a general motion for a judgment of acquittal is a proper method to challenge the sufficiency of the evidence. Here, Mr. Beharry challenged the drug amounts by direct objection, in objections to the PSR, in a post-Government case-in-chief motion for acquittal *and* in numerous of post-trial motions. Thus, Mr. Beharry has preserved his objection to the trial court's ***Apprendi*** error. *See* ***United States v. Boyd,*** 54 F.3d 868 (D.C. Cir. 1995)(holding where the defendant fails to object or to state specific grounds for overruled objection, Court of Appeals may reverse only for plain error unless the defendant can demonstrate on appeal that ground for objection was obvious from context in which it was made). *See also* ***United States v. Dennis***, 786 F.2d 1029 (1986)(holding that to preserve an issue for later consideration by the appellate court, "one must raise an objection that is sufficient to apprise the trial court and the opposing party of the particular grounds upon which appellate relief will later be sought"), *citing,* ***United States v. Haynes,*** 573 F.2d 236, 241 (5th Cir.), *cert. denied,* 439 U.S. 850 (1978). Thus, in a pre-***Apprendi*** sentencing proceeding, the objections raised by the Petitioner were sufficient as to drug amounts not charged in the indictment and found by the jury. Moreover, the ***Apprendi*** argument was raised on direct appeal and in a Petition for Rehearing *En Banc* in the lower court utilizing the arguments made by trial counsel.

Even assuming arguendo that an ***Apprendi*** error was not adequately preserved, Mr. Beharry is nevertheless entitled to relief under the plain error standard of review because the circumstances surrounding a life sentence imposed satisfy the plain error standard of review this Court announced in ***United States v. Olano,*** 507 U.S. 725, (1993). Error is *plain* if it affected the defendant's *substantial rights* and, if it error seriously *affects the fairness, integrity or public*

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[9]The Eleventh Circuit, in the *en banc* decision, ***Bonner v. City of Prichard,*** 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former 5th Circuit rendered prior to October 1, 1981.

reputation of judicial proceedings. Id. at 732. Inasmuch as the lower court in its *per curiam* unpublished opinion in the instant case acknowledged that ***Apprendi*** related plain error had occurred,[10] Petitioner focuses the following arguments on the affects on his substantial rights and the fairness, integrity or public reputation of judicial proceedings prongs.

Mr. Beharry was indicted, tried and found guilty of violating 21 U.S.C. § 841(a)(1), and 21 U.S.C. § 952(a), with no mention or notice of quantity, but was sentenced to life imprisonment for different, additional and *uncharged* drug importation, possession and distribution offenses in excess of 5 kilograms of cocaine in violation of 21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1)(B). Mr. Beharry's sentence, which exceeds the statutory maximum of 20 years under § 841(b)(1)(C) and § 960 (b)(3) authorized by the jury's verdict, clearly affects his substantial rights. An error that will cause Mr. Beharry to spend untold years in prison, beyond that authorized by the jury's verdict, necessarily affects his substantial rights.

In non-***Apprendi*** contexts, courts of appeal have not hesitated to conclude that an error resulting in an increase in the defendant's sentence affected the defendant's substantial rights. *See, e.g.*, ***United States v. Anderson,*** 201 F.3d 1145, 1152 (9th Cir. 2000) ("An error that results in a longer sentence undoubtably affects substantial rights"); ***United States v. Martinez-Rios,*** 143 F.3d 662, 676 (2nd Cir. 1998)(finding clerical error which increased defendant's sentence by several months to affect substantial rights). Indeed, this Court recently held in ***Glover v. United States,*** 531 U.S. 198 (2001), that an increase in a defendant's sentence of at least *six months* was prejudicial in relation to an ineffective assistance of counsel claim under ***Strickland v. Washington,*** 446 U.S. 668 (1984). Of relevance here, this Court noted that "any amount of actual jail time has Sixth Amendment significance." ***Glover,*** 531 U.S. at 203. *See also* ***United States v. Knight,*** 266 F.3d 303 (3rd Cir. 2001)(holding application of an incorrect sentencing guideline range affected substantial rights and was plain error even though sentence was also within correct range).

In ***Apprendi*** violation cases, numerous courts have recognized that extra prison time affects substantial rights. In ***United States v. Norby,*** 225 F.3d 1053, 1060 (9th Cir. 2000), the court stated

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[10]*See* ***Beharry*** 265 F.3d 1062. *See also Pet.* App. "1" at 22-32, 11th Cir., opinion, *7.

that "[f]ive additional years of imprisonment were imposed beyond that authorized by this verdict, which easily affected [defendant's] substantial rights." It reiterated that holding the following year in ***United States v. Buckland,*** 259 F.3d 1157,1168, *reh'g en banc granted,* 265 F.3d 1085 (9th Cir. 2001)("Imposing a sentence that is seven years more than permitted under the facts as found by the jury undoubtably seriously affects the fairness, integrity or public reputation of judicial proceedings."). Moreover, the Tenth Circuit in ***United States v. Jones,*** 235 F.3d 1231 (10th Cir. 2000), recognized that it "regularly found reversible error when the sentence imposed by the district court exceeded the statutory maximum penalty applicable to the offense of conviction." *Id.* at 1238. Even courts that did not ultimately reverse on the basis of ***Apprendi*** error have recognized that prison sentences in excess of the applicable maximum affect substantial rights. *See* ***United States v. Promise,*** 255 F.3d 150, 160-61 (4th Cir. 2001); *see also* ***United States v. Mietus,*** 237 F.3d 866, 875 (7th Cir. 2001)(assuming that ***Apprendi*** error that increased a defendant's sentence by 7 years affected his substantial rights).

Because the Eleventh Circuit's opinion in the instant case would leave intact a sentence beyond the statutory maximum that was neither based on the statute with which he was charged, nor based on a jury finding under the beyond-a-reasonable-doubt standard, thereby ignoring established constitutional principles, Mr. Beharry cannot see how the effect could be other than to impugn the "fairness, integrity and public reputation" of the judicial process. The fact that the Eleventh Circuit (among others, as discussed *infra*) condones a process by which judges routinely usurp a determination within a jury's province, strikes at the reputation of the judicial proceedings in the instant case. Such a procedure undermines, indeed nullifies, the long tradition in American constitutional criminal jurisprudence that it is the jury, rather than the judge, that must determine the offense for which the defendant has been sentenced and that it must so find beyond a reasonable doubt. Thus, in this regard Mr. Beharry is entitled, at the very least, to be resentenced under the so-called catchall[11] statutes of 21 U.S.C. §§

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[11]***See United States v. Trout,*** 68 F.3d 1276, 1280 (11th Cir. 1995)(describing § 841(b)(1)(C) as a "catchall provision"); *see also* ***United States v. Houle,*** 237 F.3d 71, 79 (1st Cir. 2001)("Section 841(b)(1)(C), the statutory catchall[,] authorizes a term of imprisonment').

841(b)(1)(C) and 960(b)(3) respectively, in order that a constitutionally prescribed sentencing scheme may be applied to the instant case.

Applying ***Apprendi*** to such sentencing schemes, a growing number of circuit courts have come to understand that if a defendant has not been charged with an aggravated quantity offense, he may not be sentenced for one—regardless of how compelling the Appellate Court finds the evidence as to quantity presented at trial. Nevertheless, a significant circuit split remains within the federal judiciary regarding this issue. The various Circuit rulings turn generally on a number of respective factors with circuit splitting results: (a) where the quantity was charged in the indictment but *not* submitted to the jury; (b) where the quantity was neither charged in the indictment *nor* submitted to the jury; (c) whether the failure to charge quantity in the indictment and/or submit such to the jury created an inherent structural defect depriving the court of jurisdiction to *try* the defendant; and (d) whether the failure to charge quantity in the indictment and/or submit such to the jury created an inherent structural defect depriving the court of jurisdiction to *sentence* the defendant.

The District of Columbia, First, Third, Seventh and Eleventh Circuit Courts have generally held that failure to charge quantity in the indictment is not a jurisdictional defect, and that such error is subject to plain error review where the sentence will not be overturned when the evidence as to quantity adduced at trial is "overwhelming" or "whether the evidence was sufficiently conclusive to support the sentence actually imposed." (*See* Circuit by Circuit analysis, *infra*). As the instant case originated in the Eleventh Circuit Court, this Court should note that the lower court, feeling itself constrained to follow ***Neder v. United States,*** 527 U.S. 1 (1999),[12] joined with the First and Seventh Circuits, to reach the astounding conclusion that an appellate court can be confident in retrospect that a grand jury *would* have returned an indictment charging the requisite quantity whenever the trial evidence was so strong that the petit jury *would* have been bound to reach the same conclusion. *See* ***McCoy v. United States,*** 266 F.3d 1245, 1251 (11th Cir., 2001), *quoting* ***United States v. Martinez,*** 258 F.3d 582, 587 (7th Cir., 2001). In doing so, these lower courts have impermissibly

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[12]Erroneous jury instructions that omit element of the offense is subject to harmless error analysis; ***Neder*** 527 U.S. at 10.

replaced *all* constitutionally required triers of fact with their pure speculation about a hypothetical jury's action.[13] In these circuits, rather than remand for resentencing to a sentence that does not exceed the statutory maximum, the courts have devised a rationale[14] that was arrived at in an unconstitutional manner. Following the sentencing rationale of these circuits would enable the Government to charge and convict a defendant of manslaughter, but sentence him for murder, and, as long as the Government produced evidence at trial that would support that sentence, the lower courts would not notice or correct such an error under F.R.Crim.P. Rule 52(b) and require resentencing in accordance with the jury's verdict. These circuits have, by and large, failed to appreciate the dispositive difference between ***Apprendi*** cases in which quantity *is* charged in the indictment and those in which it is *not*. Even if it is true that, where quantity was charged in the indictment, an ***Apprendi*** error in failing to submit the quantity to the jury "is in material respects indistinguishable" from the failure to submit the materiality element with which this Court was concerned in ***Neder***, as some courts have concluded, the same cannot be said when quantity is *not* charged in the indictment. In ***Neder***, the defendant was found guilty beyond a reasonable doubt of every element of the offense with which he was charged.

The instant case, by contrast, does not involve merely a failure to submit an element of the *charged* offense to the jury, but rather, like ***Apprendi,*** it involves the complete *failure to charge at all the offense for which Mr. Beharry was sentenced.* In such a case, there simply is no framework in which a trial for a greater offense

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[13]*See* ***Smith v. United States,*** 360 U.S. 1, 9 (1959)("the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules"). *See also* ***Sullivan v. Louisiana,*** 508 U.S. 275, 310 (1993)(finding that where an instructional error consists of a misdescription of the burden of proof, "a reviewing court can only engage in pure speculation [regarding] what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty'"), *internal citations omitted*; ***Sullivan v. Louisiana,*** 508 U.S. 275, 280 (1993)(in a case finding that defective reasonable doubt instructions to the jury constituted structural error, this Court held that "[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action...").

[14]It is respectfully submitted that such a rationale is pure boot-strapping to achieve a desired result.

may proceed or within which the defendant may be sentenced for the greater offense—a quintessential structural error. *See* ***Arizona v. Fulminante,*** 499 U.S. 279, 310 (1991)(holding that structural errors which affect the framework in the way a criminal trial proceeds, as opposed to simply an error in the trial process itself, is not subject to the harmless error analysis).

The Second, Fourth, Fifth, Sixth, Eight, Ninth and Tenth Circuits, on the other hand, have generally recognized the jurisdictional defect inherent in indictments which do not specify quantity, and the concomitant prohibition on sentencing the defendant for an offense greater than that charged by the grand jury. Those of the above that have not explicitly recognized jurisdictional defects in such a process, have alternately applied the plain error factors, prescribed in ***Olano v. United States,*** 507 U.S. 725 (1993), as plain error *per se*. Petitioner respectfully suggests that such is the only correct result consistent with the Fifth Amendment grand jury guarantee.

Circuit Modes of *Apprendi* Error Analysis:

a. District of Columbia:

Plain Error determined by the *lower court's* view of the evidence adduced at trial:

In ***United States v. Fields,*** 242 F.3d 393, 396 (D.C. Cir.), *aff'd and amended on reh'g,* 251 F.3d 1041, 1043 (D.C. Cir. 2001), the court held that "[i]n light of ***Apprendi***, it is now clear that in drug cases under 21 U.S.C. §§ 841 and 846, before a defendant can be sentenced to any of the progressively higher statutory maximums that are based on progressively higher quantities of drugs...the Government must state the drug type and quantity in the indictment, submit the required evidence to the jury, and prove the relevant drug quantity beyond a reasonable doubt." Reviewing under the plain error standard, the court vacated Fields' sentence finding that "given the gravity of the sentence and lack of any 'overwhelming' evidence to support it, [the court has] no basis for concluding that the error did not 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" ***Fields II*** 251 at 1045, *quoting* ***Johnson v. United States,*** 520 U.S. 461, 466-67 (1997). In a later case, the court, applying the same analysis, declined to grant relief because it found the evidence of drug quantity *was* overwhelming and had not been contested at trial or sentencing. ***United States v. Webb,*** 255 F.3d 890, 900-01 (D.C. Cir. 2001).

b. ***The First Circuit:***

Plain Error determined by the *lower court's* view of the evidence adduced at trial:

The First Circuit reviews ***Apprendi*** for plain error and declines to find that the defendant's substantial rights were violated if the evidence of drug quantity at trial was such that a reasonable jury could not have failed to find the requisite quantity beyond a reasonable doubt. *See e.g.*, ***United States v. Patrick,*** 248 F.3d 11, 28 (1st Cir.), *cert. denied,* 122 S.Ct. 620 (2001); ***United States v. Terry,*** 240 F.3d 65, 72-75 (1st Cir.), *cert. denied,* 121 S.Ct. 1965 (2001). In ***United States v. Mojica-Baez,*** 229 F.3d 292 (1st Cir.), *cert. denied,* 121 S.Ct. 2215 (2001), the First Circuit decided a case in which defendants challenged their sentences under 18 U.S.C. § 924(c) on the ground that, because the indictment failed to charge the type of firearm involved, they could not be sentenced on the basis of a judicial finding that a semiautomatic weapon was used in the offense. The court concluded that the error was not structural in nature, *id.* at 309-10, but that, on the contrary, it was compelled by ***Neder v. United States,*** 527 U.S. 1 (1999), to apply plain error review, even though ***Neder*** was concerned with the failure to instruct the petit jury rather than, as in the case before it, with failure of the grand jury to charge an element of the offense. *Id.* at 311. The difference, the court indicated, was not significant where the indictment provided the defendant with fair notice of the charges before him. *Id.* The court reasoned that the indictment's failure to charge use of an automatic weapon could, in the court's estimation, be disregarded as inconsequential because the petit jury would have undoubtably convicted the defendant of using an automatic weapon. The court arrived at this *reasoning* even though it conceded that it had no idea whether evidence regarding the use of a semiautomatic weapon was ever submitted to the grand jury. The First Circuit has applied ***Mojica-Baez*** in the ***Apprendi*** context. *See* ***Terry,*** 240 F.3d at 74.

c. ***The Second Circuit:***

Plain Error/ *per se* reversible:

The Second Circuit considered the impact of ***Apprendi*** on sentencing under § 841 and the appropriate appellate standard of review where the error was not preserved at trial in ***United States v. Thomas,*** - F.3d -, 2001 WL 1579993 (2nd Cir. Dec. 12, 2001)(No. 98-1051), *en banc.* The court held that "if the type and quantity of drugs involved in a charged crime may be used to impose a sentence above the statutory maximum for an indeterminate quantity of drugs, then

the type and quantity of drugs is an element of the offense that must be charged in the indictment and submitted to the jury." *Id.* at *1. The Court further concluded, overruling its decision in ***United States v. Tran,*** 234 F.3d 798 (2nd Cir. 2000), that both failure to charge drug type and quantity in the indictment and failure to submit the issue to the jury are subject to plain error review when the issue was not raised in the district court. ***Thomas,*** *supra,* at *5-7.

Applying the plain error standard, the court found that the district court in ***Thomas*** committed error which was "plain." The court then turned to the question whether the error violated Thomas' "substantial rights," noting, but not deciding, the question whether the error was one in sentencing or, instead, an error in both trial and sentencing. *Id.* at *9. The court did not find it necessary to resolve that issue because it concluded that, under either alternative, Thomas' substantial rights were violated. If the error was one in sentencing, a sentence which exceeded the 240 month statutory maximum by 52 months "as a direct result of the error of using a drug quantity neither charged nor found by the jury, constitutes prejudice. *Id.* If, on the other hand, the error was one in Thomas' conviction, he was convicted of a crime not charged by the grand jury and had, therefore, been subjected to what was in effect a constructive amendment of the indictment in violation of the principles articulated by this Court in ***Stirone v. United States,*** 361 U.S. 212 (1960), and ***Ex parte Bain***, 121 U.S. 1 (1887). *See* notes,. 4, 5, 6, *ante*. The court concluded, "if we regard the error in this case as conviction of the defendant of an offense other than the offense with which he was charged in the indictment, then we are led to the conclusion that the error in this case was also prejudicial *per se."*

Finally, the court found that the error seriously affected both the fairness and public reputation of judicial proceedings in the case before it; the former because Thomas was prepared to contest drug quantity at sentencing and the error deprived him of the opportunity to do so, and the latter because:

> the error in this case can be seen as an error in sentencing—*i.e., the district court imposing a sentence that it had no actual authority to impose.* It can also be seen as an error in *conviction—i.e., as the conviction of a defendant for a crime different than the crime charged in the indictment* and for which an element that the defendant was demonstrably prepared to contest was *decided by the*

judge by a preponderance-of-the-preponderance-of-the-evidence standard rather than by a jury beyond reasonable doubt.

Id. at *12 (emphasis added).

d. The Third Circuit:

Plain Error determined on the court's view of the evidence adduced by the court at trial:

The Third Circuit considered ***Apprendi*** issues *en banc* in ***United States v. Vazquez,*** 271 F.3d 93 (3rd Cir. 2001). Since the indictment charged Vazquez with, among other things, conspiracy to possess more than 5 kilograms of cocaine, the court was not presented with the issues which arise from failure to charge the quantity element in the indictment. Applying the plain error standard, the court concluded that the error in failing to submit the drug quantity issue to the jury was "plain." *Id.* at 99-100. In analyzing the substantial rights inquiry, the court concluded that the error was a combined trial/sentencing error because both trial and sentencing error are inextricably intertwined and, as such, should be evaluated against the entire record. *Id.* at 101-02. The court also found this approach in accordance with, if not dictated by, ***Neder*** and ***Johnson***, both of which involved a failure to submit an essential element of the offense to the jury. Under this inquiry, the appellate court would not remedy the plain error if "the evidence was sufficiently conclusive to support the sentence actually imposed." *Id.* Relief would, however, be available "if the defendant contested the omitted element and raised evidence sufficient to support a contrary finding." *Id., quoting* ***Neder,*** 527 U.S. at 19. The court proceeded to deny relief concluding that the evidence established the requisite quantities beyond a reasonable doubt. *Id.* at 104.

e. The Fourth Circuit:

Plain Error is *per se* reversible and finding jurisdictional defect when quantity is not charged in the indictment:

The Fourth Circuit considered ***Apprendi*** *en banc* in ***United States v. Promise,*** 255 F.3d 150, 160 (4th Cir.)(*en banc*), *petition for cert. filed,* - U.S.L.W. - (U.S. Sept. 20, 2001)(No. 01-6368), a case in which quantity was not charged in the indictment or submitted to the jury but the defendant was sentenced to 360 months' imprisonment. Subsequent to *Promise*, a divided panel of the Fourth Circuit, drawing heavily on the dissenting opinion in *Promise*, vacated the convictions of defendants who were sentenced to more than the default statutory maximum, concluding that, where quantity

was not charged in the indictment, the defect inherent in sentencing a defendant for a crime with which he was not charged is so fundamental as to *always* require correction under the plain error standard, no matter how strong the quantity evidence at trial. ***United States v. Cotton,*** 261 F.3d 397, 403-407 (4th Cir.), *cert. granted,* 2002 WL 10623, 70 USLW 3348 (U.S. Jan. 04, 2002)(No. 01-687). The defect, according to the majority, was jurisdictional in nature. *Id.* at 405.

f. ***The Fifth Circuit:***

Consistently corrects error where quantity was *not* charged in the indictment finding jurisdictional defect in the imposition of a sentence exceeding the statutory maximum of the offense charged in the indictment:

See ***United States v. Gonzalez,*** 259 F.3d, 360-61, n. 3 (5th Cir. 2001). *See also,* ***United States v. Baptiste,*** 264 F.3d 578, 593-95 (5th Cir. 2001).

g. ***The Sixth Circuit:***

Per se reversible error where the indictment does not charge the quantity of controlled substances and the defendant is sentenced within the sentencing range of an aggravated § 841 offense:

See, e.g., ***United States v. Ramirez,*** 242 F.3d 348 (6th Cir. 2001). *See also* ***Gibson v. United States,*** 271 F.3d 247 (6th Cir. 2001); ***United States v. Flowal,*** 234 F.3d 932 (6th Cir. 2000). *But see* ***United States v. King,*** 272 F.3d 366 (6th Cir. 2001)(*affirming* where defendant sentenced to less than the 20 year maximum under the default provision of 21 U.S.C. § 841(b)(1)(C)), *Id.* at 377, and (where defendant objected at sentencing and the PSR only that the amount in question was closer to 300 grams rather than one kilogram of actual methamphetamine), *Id.* at 378.

h. ***The Seventh Circuit:***

Rejects ***Apprendi*** based argument that district courts lack subject matter jurisdiction to try the defendant:[15]

See ***United States v. Bjorkman,*** 270 F.3d 482, 490 (7th Cir. 2001). *See also* ***United States v. Brough,*** 243 F.3d 1078, 1079-80 (7th Cir.

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[15]In the instant case, Mr. Beharry does not contend, solely, that an ***Apprendi*** error deprives the district court of jurisdiction to *try* a defendant (the issue expressly addressed by the 7th Circuit), but also, whether such an error deprives the district court of jurisdiction to *sentence* a defendant for a greater offense than that with which he was charged or of which he was convicted.

2001)(holding that quantity is not a "real element" of the offense).

i. ***The Eighth Circuit:***

Reversible error found whenever quantity is not charged in the indictment:

The standard here is very much like that in the Fourth and Fifth Circuits: where quantity was not charged in the indictment and the defendant was sentenced in excess of the default statutory maximum, a sentence violates the defendant's substantial right to be tried only on the charges presented in an indictment returned by the grand jury and is reversible. *See* ***United States v. Maynie,*** 257 F.3d 908, 921 (8th Cir. 2001)("judge lacks the authority to sentence a defendant to an uncharged crime"). *See also* ***United States v. Frazier,*** 2001 WL 1359243 (8th Cir. 2001) at *13 (no effect on defendant's substantial rights where indictment charged requisite quantity to trigger sentence imposed, even though such quantity was not submitted to the jury for a beyond-a-reasonable-doubt determination).

j. ***The Ninth Circuit:***

In ***United States v. Buckland,*** 259 F.3d 1157, 1163-68 (9th Cir.), *reh'g en banc granted,* 265 F.3d 1085 (9th Cir. 2001) a divided panel of the Ninth Circuit held that 21 U.S.C. § 841 was facially unconstitutional because the "structure of the statute itself and the history clearly evince congressional intent that drug quantity be a sentencing factor, not an element of the offense," *Id.* at 1165, and because §§ 841(b)(1)(A), (b)(1)(C) permit the district court to find quantity by preponderance of the evidence, thus violating the due process principles articulated in ***Apprendi***. *Id.* A later panel of the Ninth Circuit vacated sentences in excess of the default statutory maximum where quantity was not charged in the indictment because the sentences "exceed[ed] the statutory maximum for the crime of which the jury has found the defendant guilty." ***United States v. Rodriguez,*** 262 F.3d 1024, 1025-26 (9th Cir. 2001).

k. ***The Tenth Circuit:***

The Tenth Circuit has held that ***Apprendi*** error, where the greater offense is not charged in the indictment, requires resentencing on the lesser offense, without harmless or plain error review, as such sentences are "unauthorized." ***United States v. Jackson,*** 240 F.3d 1245, 1248-49 (10th Cir.), *cert. denied,* 122 S.Ct. 112 (2001); ***United States v. Jones,*** 235 F.3d 1231, 1233 (10th Cir. 2000). *But cf.* ***United States v. Cernobyl,*** 255 F.3d 1215 (10th Cir. 2001)(sentence vacated under plain error standard).

L. The Eleventh Circuit:

The Eleventh Circuit held in ***McCoy v. United States,*** 266 F.3d 1245 (11th Cir. 2001), that ***Apprendi*** errors are not jurisdictional. Even though the indictment did not charge the quantity, the Court analogized the defect to the instructional error in ***Neder*** and felt itself, therefore, constrained to follow ***Neder***, as had the *First* and *Seventh* Circuits, and to subject the error to plain error review. ***McCoy*** at 1250-51. Like the Seventh Circuit, the court regarded the jurisdictional question as one relating to the district court's power to *try* the defendant at all and did not focus upon the district court's power to *sentence* a defendant for an offense of which he was neither charged nor convicted. *Id.* at 1252-54. The court also rejected any notion that ***Stirone*** had any applicability in the ***Apprendi*** error context. *Id.* at 1254.

The court expanded on ***McCoy*** in its *en banc* opinion in ***United States v. Sanchez,*** 269 F.3d 1250 (11th Cir. 2001), in which it concluded that ***Apprendi*** error, even where quantity was not charged, is not structural because it is analogous to the instructional error in ***Neder***, ***Sanchez*** at 1272-73, nor is it jurisdictional because it does not implicate the power of the court to adjudicate at all. *Id.* at 1273. According to the Eleventh Circuit, quantity is not really an element of the offense and need not be charged in the indictment; *id.* at 1278-79; the failure to charge quantity only becomes problematic when the judge sentences the defendant to a sentence in excess of that provided in 21 U.S.C. § 841(b)(1)(C). *Id.* at 1277-80. Judge Barkett, concurred in the results of both ***McCoy*** and ***Sanchez*** but would have found in both that because drug quantity is an element of the crimes punishable by 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(B), and because the district court's jurisdiction is limited to the offense charged in the indictment, failure to charge drug quantity is a *jurisdictional* bar to the imposition of any *sentence* in excess of 20 years, ***McCoy*** 266 F.3d at 1261-1266, and that such a sentence is invalid. *Id.* at 1268. Such a sentence, moreover, constructively amends the indictment "in just as substantial a manner as that prohibited in ***Stirone***, and thus, as in ***Stirone***, the error is *per se* reversible." *Id. See also* ***Sanchez*** at 1304-1316.

D. The sentencing court violated the Petitioner's Sixth Amendment rights where, over defense counsels expressed objections, the court attributed to Petitioner drug quantities beyond those of two events for which Petitioner was

convicted, and where some of those additional quantities were alleged to be part of a conspiracy on which the jury could not reach a verdict, and some were from alleged importations outside the time period of the instant conspiracy.

At sentencing, over defense counsel's repeated and specific objections, the court found an additional 217 kilograms of cocaine (over and above the 47 kilograms of cocaine the court attributed to Mr. Beharry as a direct result of the counts of conviction) for a total of 263 kilograms of cocaine. These findings were based on a preponderance of the evidence standard. Although defense counsel asked the court to apply the "clear and convincing" standard to its relevant conduct quantities determinations, and the court went on to state that it had so found, such findings by the court were in violation of Mr. Beharry's constitutional due process rights because he was never charged with such quantities; he never had such quantities determined by the jury beyond a reasonable doubt and such quantities were found wholly, and solely, by the court. Indeed, it strains reason to understand how the sentencing court could find (a) that "the evidence in this case absolutely establishes that there was a conspiracy;" (R-587-2978), and (b) go on to sentence the defendant based on quantities beyond the scope of the very conspiracies contained in the indictment on which the jury could not find the evidence sufficient to convict on the counts which the court viewed during trial as "the heart of the case." [*See* R-586-2837]. Such a process resulted in a *de facto* jury verdict nullification by the sentencing court and serves to illustrate the flaw in the reasoning of the cases cited *ante* where the courts base their decisions on what *they may* think the jury *would* have found, or should have found.

Regardless of the quantities unconstitutionally imputed to Mr. Beharry by this flawed process, he was illegally sentenced as (argued in detail *supra*) the court could not have sentenced him to more than that 20 year statutory maximum cited in the catchall 21 U.S.C. §§ 841(b)(1)(C) and 960(b)(3) irrespective of whatever quantities the court erroneously imputed at sentencing. This is so "because a maximum sentence set by statute trumps a higher sentence set forth by the Guidelines." ***Edwards v. United States***, 523 U.S. 511, 515 (1998); USSG § 5G1.1. As Mr. Beharry was sentenced under the Guidelines to life imprisonment (well beyond the statutory maximum) based wholly on quantities which were uncharged and/or quantities for which the jury could not convict, his

sentence must be reversed. To support a contrary finding, this Court would have to consider that, perhaps, jurors should be instructed not to concern themselves so much with *seeking* unanimity on *all* the counts because, as soon as they reach any guilty verdict, the court will take over its duties and sentence the defendant on whatever it (the court) finds—even if such findings are completely contrary to the jury's verdict(s), (or failure to reach a verdict), on any remaining counts.

E. The Circuit Court violated Petitioner's Sixth Amendment rights when it used counsel's quantity arguments at sentencing as a basis for affirming the conviction when such arguments were merely presented as alternative arguments to rebut quantities the Government was imputing for the sole purpose of increasing Petitioner's sentencing exposure.

At Mr. Beharry's sentencing proceeding, defense counsel vigorously disputed the Government's eventually successful attempts to impute quantities of cocaine beyond those attributed to the counts on which the jury reached a verdict. Because the jury reached verdicts of guilty on only the two possession and two importations of February 2, 1993, and February 10, 1993, which allegedly involved an aggregate total of 46 kilograms, counsel, in a pre-***Apprendi*** proceeding, utilized "alternative" arguing solely in an attempt to limit Mr. Beharry's sentencing exposure. Specifically, the following arguments, *inter alia,* were put forth by defense counsel at sentencing:

> ...[t]o begin with, Mr Beharry is convicted of importation of February 2nd which involves 10 kilos of cocaine, and February 10 which involves 36 kilograms of cocaine. No question he has to be held responsible for that. The Government wants you to multiply that by a factor of three so we get in excess of 150 kilos so that they *could get additional punishment*. So we are dealing with a factor of well over three times what the Defendant was convicted of in order to get where they want to go.

(Emphasis added)(R-587-2968).

> I believe the only amounts the Court can use is 46 kilograms of cocaine that were involved in February 2, and February 10.... We would ask the Court to

find only 46 kilograms of cocaine are usable in terms of drug amounts.

(R-587-2971).

These statements must be viewed in the context of Mr. Beharry's sentencing. As the litigation process had ended with the jury's verdict and the sentencing phase had begun, defense counsel above was obviously exercising his duty to limit the sentencing exposure of his client while simultaneously maintaining credibility with the court by adhering to binding precedent in sentencing determinations at the time of the proceedings. After challenging all of the factual allegations in the PSR, including his guilt and drug quantity, Mr. Beharry proceeded to argue that the largest quantity of drugs for which he could be held responsible was the 46 kilograms of cocaine allegedly involved in the two shipments for which he was convicted. Moreover, defense counsel meticulously objected to specific amounts and sources for the PSR's allegations of drug quantity. (R-587- 2968, 2971-72). Thus, taken in context, at no time did Mr. Beharry or his counsel admit that Mr. Beharry was responsible for 46 kilograms of cocaine. Instead, counsel argued in the *alternative* that if any drug quantity were to be attributed to Mr. Beharry, 46 kilograms was the most that could be found.

As is clear from the record, the court eventually sentenced Mr. Beharry on the basis of an additional 217 kilograms of cocaine beyond the 46 kilograms the court attributed to the counts of conviction for a total drug quantity of 263 kilograms of cocaine. These findings served as the basis for Mr. Beharry's term of life imprisonment.

In his Initial Brief on direct appeal to the court below, Mr. Beharry continued to vigorously dispute, *inter alia*, all the drug quantity findings made by the district court.[16] In its Answer Brief, ~~much to Mr. Beharry's~~ astonishment, the Government used defense counsel's alternative arguments on drug amounts at sentencing as a reason for the lower court to affirm the sentence based on the fact that Mr. Beharry had "conceded" drug amounts of 46 kilograms. Specifically, the Answer Brief states: "[i]ndeed, defendant expressly conceded that 46 kilograms of cocaine is the amount of the two importations of which Mr. Beharry was convicted." (See Govt Answer below, pp. 14, 21). Most significantly, in its unpublished opinion, the lower court cited to defense counsel's arguments at

[16]See Pet. App. "2" at 1-60.

sentencing as part of its rationale in affirming Mr. Beharry's conviction and sentence. (Pet. App. "1" at 31). That such arguments by defense counsel, demonstrative of prudent advocacy at the time, came to be used to Mr. Beharry's prejudice, is impermissible and violative of his due process rights under the Fifth and Sixth Amendments of the Constitution. Such an outcome serves to chillingly constrain counsels' advocacy at a critical stage in federal proceedings and leaves defendants to the mercy of quantities alleged in the PSR with merely per functionary objections on which to fall back on appeal.

This Court is asked to determine what exactly constitutes an "alternative argument" made at sentencing and when does such an argument, if ever, become an expressed waiver and/or stipulation with prejudicial binding results for the defendant. Arguing in the alternative has long term acceptance in American jurisprudence. *See* ***Martinez v. Harris,*** 675 F.2d 51, 54 (2nd Cir. 1982) ("Arguing in the alternative is a well-accepted practice. For instance it has been expressly approved in the rules governing federal trials. Fed.R.Civ.P. 8(e)(2). It therefore makes no sense for us to hold that when a state prosecutor acts as a prudent advocate, he waives any of the alternative arguments that he asserts"). *See also* ***Henley v. Coombe,*** 1984, 1984 WL 229 (S.D.N.Y.)("where prosecutor argues appeal on procedural grounds, a federal habeas court should presume the state court based its denial of a defendant's appeal on those independent and adequate state grounds. This is so, even though the prosecutor argued on the merits of the appeal as well"); ***Patmon v. Michigan Attorney Grievance Commission,*** 114 F.3d 1188 (Table), 1997 WL 299377 (6th Cir. Mich)(Unpublished Disposition)("The mere fact that they also presented alternative arguments...does not indicate that the defendants have waived the defense"), *Id.* at *5.

Even within the Eleventh Circuit there are conflicting, unclear dispositions as to the effects of alternative arguments. *Compare* ***United States v. Schrimsher,*** 58 F.3d 608, 610 (11th Cir. 1995)(defense counsel's unambiguous account of the negotiations surrounding the plea agreement seen as a clear *admission* by the Defendant *conceding*, in fact *stipulating*,[17] that the court could order

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[17]The facts of this case are easily distinguishable from the "alternative arguments" issue presented for review as ***Schrimsher*** affirmatively *stipulated* on the record to the loss. The instant case contains no record of any such "stipulation" or expressed waiver. *Id.* at 610.

restitution and thus *waiving* the issue on appeal)(emphasis added), *with* ***United States v. Siegel,*** 153 F.3d 1256, 1263 (11th Cir. 1998)(holding that "a lawyer's professional and courteous submission to a trial court's authority to make a factual ruling on a contested issue should not be construed as a withdrawal of an objection"). The First Circuit, in very succinct comparisons, held the following:

> [c]ounsel who loses a point can neither pout nor play the ostrich, but must move on and confront the next set of issues. Just as a lawyer who moves unsuccessfully for judgment as a matter of law must then give the court his suggested jury instructions on the issue or risk a less-than-favorable charge, so, too, a prosecutor who argues against a departure, loses, and then refuses to offer suggestions referable to the degree of departure runs a comparable risk.

United States v. Rostoff, 53 F.3d 398, 410 (1st Cir. 1995).

The instant case is easily distinguishable from cases where a failure to object to the PSR amounted to an expressed waiver and concession as to the quantity attributed therein. *See* ***United States v. Pruitt,*** 156 F.3d 638, 648 (6th Cir. 1998)(failure to object to PSR seen as "expressly agree[ing] that [defendant] should be held accountable for amount of drugs involved"); or a case where the defendant did raise an objection to the PSR but, similar to the case *sub judice*, alternatively argued to be held accountable for an expressed amount, *see* ***United States v. Nesbitt,*** 90 F.3d 164, 167-68 (6th Cir. 1996)(Defendant objected to PSR report which attributed him with between 150 to 500 kilograms at sentencing. Defendant argued that he should only be held accountable for 139 kilograms. Court of Appeals found that defendant "expressly agreed that he should be held accountable" for 139 kilograms). *See also* ***United States v. Oakley,*** 229 F.3d 1154 (6th Cir. 2000)("[d]efendant who expressly agrees to a fact upon which a guideline range is based is estopped to challenge accuracy of that fact on appeal"). Finally, *see* ***United States v. Choate,*** 101 F.3d 562, 566 (8th Cir. 1996)(holding that defendant claiming that appropriate increase under USSG § 3B.1.1(a, b), was three points for being manager or supervisor, rather than four points for being organizer or leader, waived argument that his criminal activity did not involve five or more participants because, by arguing for three-level increase, rather than four-level increase, defendant was arguing that he should come within the Sentencing

Guidelines applicable if the criminal activity involved five or more participants).

Some of the above cases conflict with each other and with ***United States v. Bjorkman,*** 270 F.3d 482, 492 (7th Cir. 2001) which held that a defendant who pleaded guilty "did not waive the requirement of ***Apprendi*** that drug type and quantity be determined by the trier of fact beyond a reasonable doubt...for sentencing came after the plea." ***Bjorkman*** aptly illustrates the difference the between stipulations and waivers attached to pre-sentencing proceedings and those arguments in the alternative raised at sentencing.

In ***Pate v. Robinson***, 383 U.S. 375 (1966) this Court ruled that where a defendant had failed to demand a sanity hearing as provided by Illinois law, he had not deliberately waived the defense of his competence to stand trial (as the state contended), where counsel insisted throughout the proceedings that sanity was very much an issue. *Id.* at 384. Finally, any of the above cited decisions which impute or imply waivers and/or stipulations to defense counsel's arguments in the alternative at sentencing run afoul of this Court's expressed proscription for waiver of rights as held in ***United States v. Olano,*** 507 U.S. 725, 733 (1993) which stated that a party waives a right when it makes an "intentional relinquishment or abandonment" of such a right; *quoting* ***Jackson v. Zerbst,*** 304 U.S. 458, 464 (1938). Mr. Beharry neither waived nor abandoned any of the quantity issues presented throughout the entire proceedings (pre-trial, trial, post-trial, sentencing, and direct appeal).[18] As a result, the Eleventh Circuit's imputation of the 46 kilograms attributed to Mr. Beharry as "conceded" requires a remand to reconsider the total amount of drugs without imputing same from alternative arguments raised to preserve error.

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[18]Near the close of the sentencing proceedings, when it appeared all but certain that Mr. Beharry would be sentenced to a life term, defense counsel also argued for a downward departure from Guideline level 44 to level 43 which has a sentencing range of 360 months to life imprisonment. This was also an "alternative argument" done solely for the purpose of having Mr. Beharry sentenced "to a term of years rather than life imprisonment." (R-587, P. 3034). Following the logic of the lower court would now preclude appellate counsel from arguing for a lower sentencing range than level 43, based upon any factors, as it can be said that Mr. Beharry "expressly conceded" to level 43. Such a holding would, of course, be insufficient on its face and contrary to all Due Process principles.

II The trial court denied the Petitioner's due process rights when it *Allen* charged the jury after the jury informed the court that they were deadlocked after reaching a verdict on one count, that such a deadlock was unanimous, and one juror had previously requested a bailiff because she feared for her safety due to the conduct of the other jurors.

On Friday, October 29, 1999, after three days of deliberations, the district court received several notes from the jury. The first note stated, "we have considered only one count and we are stuck." (R-586-2810). The second note stated that juror No. 8 (Ms. Carol Best) "does not feel safe in the jury room" and requested the bailiff. (R-586-2810). Thereafter, the judge called the juror to speak with her outside the presence of the other jurors. At that time, the following exchange took place between the court and Juror No. 8:

> COURT: Now, I want to ask you, do you feel or do you have concern for your *physical safety*?
>
> JUROR 8: At certain moments in there, *yes*.

(R-586-2834)(emphasis added). Ms. Best went on to say:

> JUROR 8: When I am being spoken to regarding statements that I have made *which may be contrary to what other jurors feel*, the voice is raised to a very high level. The *comments are directed exactly to me*, I am *commanded*, even if I am looking at a piece of paper, to stop and look and look at whoever.

(R-586-2835)(emphasis added). In response to a direct question concerning her physical safety, Juror 8 responded: "[w]ell I haven't been struck...but *I think that could move to something more physical."* (R-586-2836). The record reflects that Juror 8 was in tears and upset. Further, the above statements clearly denote an individual who is in actual fear for her *physical* safety *from other juror*(s). Upon being singled out, during deliberations, to enter the courtroom outside the presence of the other jurors, there can be no question that Juror 8 was now "on the spot" in the eyes of her fellow jurors. This was not merely a onetime emotional outburst during heated deliberations. Indeed, even the Forelady of the jury was "in

tears as well, or near tears." (R-586-2843).[19]

The court decided to give the jurors a break over the weekend to cool off and return to deliberations of Monday, November 1, 1999. They were also cautioned to be civil to one another.[20] After the jury returned on Monday and resumed deliberations, a third note form the jury was presented wherein they stated, "[w]e are unanimous on Count 5, we are hung on Counts 2, 3, 4, 6, and feel we cannot make any further progress, this is unanimous." (R-586-2846). Thereupon, over defense counsel's objection, the district court gave a modified *Allen* charge. Shortly thereafter, the jury returned guilty verdicts on Counts 2, 3, 5, and 6.[21]

Under the circumstances, such a charge was error because of its potential and actual coercive effects on the minority Juror 8 especially after that Juror had expressed fear for her physical safety. Such an effect was readily apparent to the district court at the time. *See* ***Lowenfield v. Phelps,*** 484 U.S. 231, 232 (1988)("Although coercion is suggested by the fact that the jury returned its verdict soon after receiving the supplemental instruction, defense counsel's failure to object to...the instruction at the time indicates that the potential for coercion argued now was not then apparent"); *see also* ***United States v. Elkins,*** 885 F.2d 775, 783 (11th Cir. 1989)(holding that *Allen* charge is error when it has the effect of coercing the jury). Moreover, Juror 8's note and subsequent discussion with the district court made clear that the pressure she was experiencing, to the point of fear for her physical safety, was a direct result of her deliberations, and not from extraneous prejudicial information. *See* Fed.R.Evid. 606(b). In ***United States v. Norton,*** 867 F.2d 1354 (11th Cir. 1989), the lower affirmed a conviction involving an *Allen* charge precisely because, *inter alia*, the judge *did not* question a juror regarding the duress that juror may have experienced during deliberations. To have done so, the court reasoned, "would itself have risked reversible

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[19]Describing this incident, the district court remarked: "[t]his is a tired jury. They have been battling back and forth, obviously... I think we have a conflicted jury." (R-586-2843).

[20]When asked by the district court (in reference to the "cooling off"), one juror responded: "Easier said than done." (R-586-2841).

[21]Significantly, the jury hung on the broad importation and possession "conspiracy" Counts 1 and 4 respectively. As the district court had acknowledged earlier, Counts 1 and 4 were the "heart of the case." (R-586-2843).

error, since the juror's note made clear that the pressure allegedly placed upon him resulted from discussions between the jurors...." *Id.* at 1366.

In the instant case, although the district court did not poll the jury, there is no doubt that everyone knew that Juror 8 was being singled out in the jury room. The Government's assertions in it's reply brief to the contrary, the record clearly shows that the district court and the Government were aware, in more than general terms, of the status of Juror 8 as being in the minority. Indeed, the district court stated "my suspicion is there may be some unanimity among the jury and one juror who may have a particular position..." (R-586-2812). The court went on to state that "I suppose we are assuming that the split is 11 to one...." (R-586-2853). The court then conceded that it "would be reasonable to surmise that one juror stands by herself, but that is not necessarily so. There may be others in there who share her view but are not as affected as she was by whatever counter arguments were made." (R-586-2854). The Government stated: "I am so sure it is the other 11, if you are the only person arguing one way or the other, you may feel paranoid yourself or more defensive...." (R-586-2821).

An *Allen* charge is by its very nature coercive and intimidating. *See* ***United States v. Rey,*** 811 F.2d 1453, 1460 (11th Cir. 1987)(Although reluctantly upholding the *Allen* charge in the case before it, Judge Edmondson expressed strong misgivings about its propriety and overall coercive and intrusive effect on the jury).

In the case *sub judice*, the district court knew the identity of the Juror in question; had a well-founded belief that such a Juror was in the minority; knew that Juror 8 had fears for her physical safety; and had discussed the issue with the Juror outside the presence of the other jurors. Under these circumstances, giving an *Allen* charge was inherently and unduly coercive. Accordingly, Mr. Beharry is entitled to have his conviction reversed and remanded for a new trial.

CONCLUSION

For all the foregoing reasons, therefore, *Zimmern Beharry* respectfully submits that this Court should grant this Petition for Certiorari.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* Federal Express, this 22nd day of January, 2002, to: ***Sangita K. Rao, Esq.***, U.S. Department of Justice, P. O. Box 899, Benjamin Franklin Station, Washington, D.C. 20044-0899; and ***Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530.

RHONDA A. ANDERSON, ESQ.
Counsel for *Zimmern Beharry*

Supreme Court, U.S.
FILED

NO. 01 1165 JAN 22 2002

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ZIMMERN BEHARRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX 1 TO PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 94-6015- CR-GONZALEZ

21 USC §952 (a)
21 USC §963
21 USC §841(a)(1)
21 USC §846
18 USC §2

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ZIMMERN BEHARRY,
SAROJAMIE BEHARRY, and
PATRICK KHAN,
Defendants.

_____/

FIFTH SUPERSEDING INDICTMENT

The Grand Jury charges that:

COUNT I

From or about September 1, 1993, the exact date being unknown to the Grand Jury, to on or about February 10, 1994, at the port of Savannah, Chatham County, Southern District of Georgia, at Port Everglades, Broward County, in the Southern District of Florida, and elsewhere, the defendants,

ZIMMERN BEHARRY and
SAROJAMIE BEHARRY,

did knowingly and intentionally combine, conspire, confederate and agree with each other and with persons, known and unknown to the Grand Jury, to import into

the United States, from a place outside thereof, a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 952(a); all in violation of Title 21, United States Code, Section 963.

COUNT II

On or about October 5, 1993, at the port of Savannah, Chatham County, Southern District of Georgia, and elsewhere, the defendants,

ZIMMERN BEHARRY and
SAROJAMIE BEHARRY,

did knowingly and intentionally import into the United States, from a place outside thereof, a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 952(a); and Title 18, United States Code, Section 2.

COUNT III

On or about February 2, 1994, at the Port Everglades, Broward County, in the Southern District of Florida, and elsewhere, the defendants,

ZIMMERN BEHARRY and
SAROJAMIE BEHARRY,

did knowingly and intentionally import into the United States, from a place outside thereof, a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 952(a); and Title 18, United States Code, Section 2.

COUNT IV

On or about February 10, 1994, at Port Everglades, Broward County, Southern District of Florida, and elsewhere, the defendants,

ZIMMERN BEHARRY,

did knowingly and intentionally import into the United States, from a place outside thereof, a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 952(a); and Title 18, United States Code, Section 2.

COUNT V

From on or about September 1, 1993, the exact date being unknown to the Grand Jury, to on or about February 10, 1994, at the port of Savannah, Chatham County, Southern District of Georgia, at Port Everglades, Broward County, in the Southern District of Florida, and elsewhere, the defendants,

ZIMMERN BEHARRY and
SAROJAMIE BEHARRY,

did knowingly and intentionally combine, confederate, and agree with each other and with other persons, known and unknown to the Grand Jury, to possess with intent to distribute a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1); all in violation of Title 21, United States Code, Section 846.

COUNT VII

On or about February 2, 1994, at Port Everglades, Broward County, in the Southern District of Florida,

and elsewhere, the defendants,

ZIMMERN BEHARRY and
SAROJAMIE BEHARRY,

did knowingly and intentionally possess with the intent to distribute a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT VIII

On or about February 10, 1994, at Port Everglades, Broward County, in the Southern District of Georgia, and elsewhere, the defendant,

ZIMMERN BEHARRY,

did knowingly and intentionally possess with the intent to distribute a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT IX

On or about July 1,1991, the exact date being unknown to the grand Jury, to on or about July 18, 1991, at Fort Lauderdale, Broward County, in the Southern District of Florida, and elsewhere, the defendants,

ZIMMERN BEHARRY and
PATRICK KHAN,

did knowingly and intentionally combine, conspire, confederate and agree with other persons, known and unknown to the Grand Jury, to possess with intent to

distribute a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine containing cocaine base, that is, crack cocaine, in violation of Title 21, United States Code, Section 841(a)(1) and 846.

COUNT X

On or about July 18,1991, at Fort Lauderdale, Broward County, in the Southern District of Florida, and elsewhere, the defendants,

ZIMMERN BEHARRY and
PATRICK KHAN,

did knowingly and intentionally posses with intent to distribute a Schedule II narcotic controlled substance, that is, a mixture and substance containing a detectable amount of cocaine containing cocaine base, that is, crack cocaine, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

FORFEITURE COUNT

The Grand Jury further charges that:

As a result of defendants' commission of one or more of the felony offenses alleged in Counts I through X of this fifth superseding indictment, the United States is entitled to forfeiture of, and the defendants shall forfeit to the United States, all property constituting and derived from any proceeds which the defendants,

ZIMMERN BEHARRY,
SAROJAMIE BEHARRY, and
PATRICK KHAN,

obtained directly and indirectly, as a result of such violation or violations and any of the defendants'

properties used and intended to be used in any manner, and part, to commit and facilitate the commission of said violation or violations, pursuant to Title 21, United States Code, Section 853(a), including, but not limited to, Four Million Dollars ($4,000,000.00) in United States Currency.

If any of the assets described above as being subject to forfeiture pursuant to Title 21, United States Code, Section 853, as a result of any acts or omissions of the defendants,

ZIMMERN BEHARRY,
SAROJAMIE BEHARRY, and
PATRICK KHAN,

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with a third person;

(c) has been placed beyond the jurisdiction of the court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendants, ZIMMERN BEHARRY, SAROJAMIE BEHARRY, and PATRICK KHAN, up to the value of said property listed above as being subject to forfeiture.

By virtue of the commission by the defendants, ZIMMERN BEHARRY, SAROJAMIE BEHARRY, and PATRICK KHAN, of the felony violations of Title

21, United States Code, charged in Counts I through X of this fifth superseding indictment, any and all interest which the defendants have in the above-described property is vested in the United States and hereby forfeited to the United States pursuant to Title 21, United States Code, Section 853.

A TRUE BILL

_____

FOREPERSON

_____

WILLIAM A. KEEFER
UNITED STATE ATTORNEY

_____

JAMES R. BOMA
ASSISTANT UNITED STATE ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.: 0:94CR06015-001

UNITED STATES OF AMERICA,

v.

ZIMMERN BEHARRY,

Defendant.

Roy Black, Esq.
Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE

(For offenses Committed On or After November 1, 1987)

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____

☒ was found guilty on count(s) II, III, V and VI of the Indictment on 11/01/1999, after a plea of not guilty.

Title & Section	**Nature of Offense**	**Date Offense Concluded**	**Count No.(s)**
21 U.S.C. §951(a)	Importation of cocaine.	02/02/1994	II and III
21 U.S.C. §841(a)(1)	Possession with intent to distribute cocaine.	10/05/1993	V and VI

The defendant is sentenced as provided in pages 2 through 8 of this Judgment. The sentence is imposed pursuant to the Sentencing reform Act of 1984.

☐ The defendant has been found not guilty on count(s)_____.

☒ Count(s) I and IV are dismissed on the motion of the United States.

IT IS FURTHERED ORDERED that the defendant shall notify shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

03/10/2000
Date of Imposition of Judgment

Defendant's Social Security No.: 000-00-0000
Defendant's Date of Birth: 05/25/1963
Defendant's USM No.: 31439-004
Defendant's Residence Address: Fyzabad, Trinidad
Defendant's Mailing Address: Fyzabad, Trinidad

Daniel T.K. Hurley
United States District Judge
Name& Title of Judicial Officer

March 11, 2000
Date

Defendant: **ZIMMERN BEHARRY**
Case Number: 0:94cr06015-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **life**.

This term of imprisonment consists of la term of life as to each Counts II, III, V and VI of the Fifth Superseding Indictment, to be served immediately.

- ☐ The court makes the following recommendations to the Bureau of prisons:
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution by the Bureau of Prisons:
  - ☐ before 2 p.m. on _____
  - ☐ as notified by the United States Marshall
  - ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on ___ to _____ at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By_____

Deputy U.S. Marshal

AO245B(Rev.8/96)Sheet3-Supervised Release

Judgment-Page 3 of 8

Defendant: **ZIMMERN BEHARRY**

Case Number: 0:94cr06015-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s).

This term of supervised release consists of a term of 5 years as to each of Count II, III, V and VI of the Fifth Superseding Indictment, to be served immediately.

The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance, The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable).

If this judgment imposes a fine, or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release. In accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below). See Special Conditions of Supervision - Page 4

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful

occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's

compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the Immigration and Naturalization Service for deportation proceedings consistent with the Immigration and Nationality Act.

If deported, the defendant shall not reenter the United States without the express permission of the United States Attorney General. The term of supervision shall be non-reporting if the defendant resides outside the United States. If the defendant should reenter the United States within the term of supervised release, the defendant is to report to the nearest United States Probation Office within 72 hours of his or her arrival.

Defendant: **ZIMMERN BEHARRY**
Case Number: 0:94cr06015-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 200.00	$ 250,000.00	$

☐ If applicable, restitution amount ordered pursuant to plea agreement.....$_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $250,000.00.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until ____. An Amended Judgment in a Criminal Case will be entered after such a determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

***Total Amount of Loss**	**Amount of Restitution Ordered**	**Priority Order or Percentage of Payment**
Name of Payee		
Totals:	**$**_____	**$**_____ **$**_____

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

Defendant: **ZIMMERN BEHARRY**
Case Number: 0:94cr06015-001

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately; or

B ☐ $_____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than ___; or

D ☐ in installments to commence ___ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule of appropriate; or

E ☐ in ____ *(e.g. equal, weekly, monthly, quarterly)* installments of $_____ over a period of ___ year(s) to commence ___ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed Special instructions regarding the

payment of criminal monetary penalties:

The criminal monetary penalties are due immediately and shall be paid in U.S. Courts and addressed to: U.S. Clerk's office, ATTN: Financial Section, 301 N. Miami Avenue, Room 150, Miami, FL 33128. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's office are responsible for the enforcement of this order.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall forfeit the defendant's interest in the following property to the Untied States.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

See additional Factual Findings and Guideline Application Exceptions - Page 8

Guideline Range Determined by the Court:

Total Offense Level: 43
Criminal History Category: I
Imprisonment Range: Life
Supervised Release Range: 5 years
Fine Range: $ 25,000.00 to $16,000,000.00

☐ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $0.00

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

- ☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.
- ☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

The sentence is imposed based on the guideline range and the effects the offenses have on the community.

OR

☐ The sentence departs from the guideline range:

- ☐ upon motion of the government, as a result of defendant's substantial assistance.
- ☐ for the following specific reason(s):

ADDITIONAL FINDINGS AND GUIDELINE APPLICATIONS EXCEPTIONS

The court found that a two level upward adjustment pursuant to 3C1.1 was not warranted. The court found that a two level increase was warranted pursuant to 2D1.1(b)(1), because the defendant possessed a dangerous weapon (firearm) during the commission of the offense.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-11371

[DO NOT PUBLISH]

D.C. Docket No. 94-06015-CR-DTKH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ZIMMERN BEHARRY,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(July 6, 2001)

Before BARKETT and HULL, Circuit Judges, and LIMBAUGH*, District Judge.

PER CURIAM:

Appellant Beharry, a citizen of Trinidad, was extradited to the United States, tried, and convicted of two counts of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a) and two counts of importation of cocaine into the United States in violation of 21 U.S.C. § 952(a). Beharry appeals his convictions and his concurrent sentences of life imprisonment on all four counts.

On appeal, Beharry raises the following issues in support of his contention that his convictions and sentences should be reversed: (1) that misrepresentations by government agents in connection with Beharry's extradition and indictment violated his due process rights and the extradition treaty between the United States and Trinidad; (2) that the government violated 18 U.S. C. § 201(c)(2) and Beharry's due process rights by paying government witness Wade Lalla $5,000; (3) that the government violated Federal Rule of Criminal Procedure 16 by failing to disclose prior to trial a Trinidadian police officer would testify regarding a statement made by Beharry during a traffic stop; (4) that the government violated Federal Rule of Criminal Procedure 16 and Brady v. Maryland by

failing to produce the passport of cooperating government witness Dabid Nash; (5) that the trial judge gave an impermissibly coercive Allen charge; and (6) that Beharry's life sentences violate the rule established by Apprendi v. New Jersey, 530 U.S. 466 (2000). Beharry argues that the several alleged instances of misconduct by the government, independently and cumulatively, require reversal of his convictions and dismissal of the indictment against him.

After careful review and oral argument, we find that all of the issues raised by Beharry lack merit. We find that only three issues warrant brief discussion.

I. Government Misrepresentations in Grand Jury and Extradition Proceedings

First, we discuss the misrepresentations made by government agents in connection with certain grand jury proceedings and Beharry's extradition from Trinidad.[1] Beharry moved to dismiss the indictment at the close of the government's case-in-chief and against following the conclusion of all evidence at trial based upon the government's alleged misconduct in this

---

[1]Because Beharry's argument with respect to the government misrepresentations fails even assuming that he has standing to raise that argument, we do not reach the standing questions regarding extradition for purposes of deciding Beharry's appeal. We also note that Beharry has not demonstrated clearly that the government misrepresentations at issue were made before the actual grand jury that indicted him. However, because Beharry's argument fails even assuming that they were, we need not resolve that questions either.

regard. The district court denied these motions. We review the denial of a motion to dismiss an indictment for abuse of discretion. United Stares v. Sigma Int'l, Inc., 244 F.3d 841, 851 (11th Cir. 2001).

Beharry has shown that certain government agents made misrepresentations relating to the confidential informant "Carlos Manaracha" and the pursuit of a white van in which he was riding. For example, the government even conceded that false representations were made during certain grand jury proceedings nd Beharry's extradition proceedings that "Carlos" was an unknown "fugitive" being sought for arrest, despite the fact that "Carlos" was actually a confidential informant working with the government.[2] While we understand the government's reluctance to identify "Carlos" correctly as a confidential informant, the desire to protect a confidential informant is no excuse whatsoever for making false statements under oath in connection with a grand jury or extradition proceeding and we do not condone such a practice under any circumstances.

The impropriety of the misrepresentations in this

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[2]Although DEA agent Duffy attempted to justify his prior false representations regarding Carlos during his trial testimony, there is no claim that any false representations were made concerning Carlos at trial or by any of the prosecutors who tried the case for the government. Further, we note that agent Duffy was cross-examined extensively by Beharry's counsel before the jury at trial with respect to his prior misrepresentations.

case notwithstanding, Beharry cannot succeed on his due process claim. To establish a due process violation, Beharry must establish more than the falsity of the statements at issue. He must demonstrate material misrepresentations resulting in "grave doubt" that the grand jury's decision to indict was free from the substantial influence of the government's misconduct. Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988); see also United States v. Sigman Int'l, Inc., 244 F.3d 841, 853 (11th Cir. 2001). After careful review, we find that all of the misrepresentations were not material with respect to either the grand jury proceedings or the extradition proceedings. Beharry has failed to establish any "grave doubt" that the grand jury's decision to indict was free from the substantial influence of the misrepresentations regarding the status of "Carlos: as a confidential informant.

Although the confidential informant was peripherally involved in the drug transactions for which Beharry was convicted (or at least the February 2, 1994 drug transaction), the informant's existence, identity, and participation appear to have played no significant role in the decisions to indict, extradite, and convict Beharry. For example, the actions of government witnesses Nash and Lalla on the critical dates were the centerpiece of the government's case against Beharry for the importation offenses on those dates. Even assuming that the grand jury inferred from the misrepresentations about "Carlos" that there was a fugitive still involved with Beharry and drug trafficking at the time of the indictment, any such inference has no

material bearing on the February 2 and February 10 crimes for which Beharry was inducted and convicted. Further, Beharry has not established that his misunderstanding regarding Carlo's status as a confidential informant prejudiced the preparation of his defense. Beharry's primary defense at trial was thathe was not involved in drug dealing anf that the testimony of the coperating government witness was not credible. In sum, we find no due process violation and no abuse of discretion in the district court's denial of Beharry's motions to dismiss the indictment based on these misrepresentations.[3]

II Allen Charge

With respect to the Allen charge given to the jury during deliberations in Beharry's case, we find that the totality of the circumstances surrounding the Allen charge and the language of the charge given fail to demonstrate that the charge was unduly coercive. See United States v. Elkins, 885 F.2d 775, 783 (11th Cir. 1989); United States v. Chigbo, 38 F.3d 543, 545 (11th Cir. 1994). Further, the fact that Beharry's jury failed to reach a verdict with respect to two of six counts after the Allen charge was given also demonstrates that the jury was not unduly coerced into reaching a verdict by the charge. See United States v. Trujillo, 146 F.3d 838, 847 n.6 (11th Cir. 1998) ("We also note that this [Allen]

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[3]For the same reasons, Beharry has failed to demonstrate that the government's conduct violated the extradition treaty governing extradition between the United States and Trinidad at the time of Beharry's extradition.

charge could not have been too unduly coercive, as the jury was unable to reach a verdict as to Ruiz after the district court gave it.").

III. Apprendi Error

Turning to the merits of Beharry's Apprendi claim, the government concedes that the indictment in the instant case did not allege any drug quantities in connection with Beharry's importation and possession with intent to distribute offenses. Nor was the issue of drug quantity submitted to the jury for a finding beyond a reasonable doubt. Nonetheless, the district court sentenced Beharry to concurrent terms of life imprisonment based on judge-made drug quantity findings at sentencing, a term of imprisonment well over the twenty-year statutory maximum penalty applicable to both his possession with intent to distribute and importation drug offenses under 21 U.S.C. §§ 841 (b)(1)(C) and 960(b) without regard to drug quantity.[4] As the government concedes, therefore,

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[4]Like the penalty provisions governing § 841 (a) drug offenses, the penalty provisions governing the importation of drugs under 21 U.S.C. § 960(b) also vary based upon the drug quantities involved in the offense. While certain maximum penalties are available for the importation of specific drug quantities only, other lower maximum penalties apply to importation offenses without reference to drug quantity. See 21 U.S.C. §§ 960(b)(1)(2), and (3). Thus, the application of Apprendi to § 841 drug prosecutions for possession with intent to distribute also governs the substantially similar penalty provisions for prosecutions involving the importation of drugs

Beharry's sentence violates Apprendi. See United States v. Candelario, 240 F.3d 1300, 1306 (11th Cir. 2001) (explaining that there is Apprendi error where drug quantity is not charged in the indictment and submitted to a jury for a determination beyond a reasonable doubt "if the defendant's sentence exceeds the maximum sentence allowed by a statute without regard to drug quantity").

Thus, the question is only whether the error violated Beharry's substantial rights.[5] We agree with the government that there is no prejudice to Beharry's substantial rights as a result of the Apprendi error because the undisputed evidence offered at trial with respect to drug quantities was overwhelming and more than sufficient to support Beharry's concurrent life

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under 21 U.S.C. § 952.

[5]The parties dispute whether Beharry's Apprendi claim is subject to preserved error review or plain error review. We need not decide which standard applies, however, because the result in this case is the same under either standard of review. See Candelario, at 1310 n.14 ("We recognize that in drug cases alleging Apprendi violations, there is no material difference between preserved error review and plain error review, with the exception of this burden-shifting regarding substantial rights. Moreover, to this date, this difference in who bears the burden of proof has not yielded different results in drug cases alleging Apprendi violations. If this pattern holds, the only functional difference between preserved error review and plain error review will be the fourth prong of plain error review.").

sentences. Specifically, cooperating government witness David Nash testified that he retrieved 30 kilograms of cocaine on February 2 on Beharry's instructions and that 20 kilograms belonged to Beharry. Further, cooperating government witness Wade Lalla testified that he took possession of 36 kilograms of cocaine on February 10 pursuant to Beharry's instructions. Finally, the defense expressly conceded at sentencing that "46 kilograms of cocaine" was the "combined amount of the two importations of which Mr. Beharry was convicted." In light of this evidence regarding drug quantity with respect to the two dates at issue Beharry's possession with intent to distribute and importation offenses, we find that no rational jury could have convicted Beharry of those offenses without also finding that he imported and possessed with intent to distributer at least five kilograms pf cocaine, a quantity sufficient to support a life sentence under both 21 U.S.C. §§ 841 (b) and 960 (b), the relevant penalty provisions for Beharry's possession with intent to distribute and importation offenses. See United States v. Swatzie, 228 F.3d 1278, 1282-83 911th Cir. 2000) ("no evidentiary basis existed for the jury reasonably to have found that Swatzie possessed drugs with intent to distribute," but did not possess at least the amount necessary to trigger the maximum life sentence).

AFFIRMED.

CASE NO. 00-11371

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee/Plaintiff,
vs.
ZIMMERN BEHARRY,
Appellant/Defendant.

On Appeal From The United States District Court
For The Southern District of Florida,
West Palm Beach Division, Criminal Division
Case No. 94-6015-Cr-Hurley

PETITION FOR REHEARING AND REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for the Appellant, *Zimmern Beharry,* hereby certifies pursuant to Eleventh Circuit Rule 26-1.1 that the following is a complete list of persons and entities who have an interest in the outcome of this case:

Rhonda A. Anderson, Esq.,
counsel for Appellant Beharry

Karen Atkinson, Assistant U.S. Attorney

Zimmern Beharry, Defendant/Appellant

Roy Black, Esq., *Black, Srebnick & Kornspan,*
counsel for Appellant Beharry

Hon. Daniel T.K. Hurley,
U. S. District Court Judge

Christine Ng, Esq., *Black, Srebnick & Kornspan,*
counsel for Appellant Beharry

Jacqueline Perczek, Esq., *Black, Srebnick & Kornspan*, counsel for Beharry

Bruce Reinhart, Esq., Assistant U.S. Attorney

Sangita Rao, Esq.,
Dept. of Justice, Criminal Appellate Section

STATEMENT IN SUPPORT OF *EN BANC* CONSIDERATION

I express an belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court and that consideration by the fully court is necessary to secure and maintain uniformity of decisions in this Court with the United States Supreme Court. Additionally, I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

I. As to whether *Apprendi* prohibits a court from determining the quantity of drugs for defendants charged with drug offenses, where the indictment does not allege the quantity of drugs, the indictment fails to charge the penalty provisions, and the jury was *not* instructed to determine the quantity of drugs beyond a reasonable doubt?

A. ***Apprendi v. New Jersey,*** 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

B. ***United States v. Baptiste,*** - F.3d - , 2001 WL 1006712 (5th Cir. 2001).

C. ***United States v. Gonzalez,*** 259 F.3d 355 (5th Cir., 2001).

D. ***United States v. Longoria,*** 259 F.3d 363 (5th Cir.), *rehrng en banc granted,* - F.3d -, 2001 WL 946413 (5th Cir., Aug. 15, 2001).

E. ***United States v. Buckland,*** 259 F.3d 1107 (9th Cir., Aug. 9, 2001).

F. ***United States v. Candelario,*** 240 F.3d 1300 (11th Cir.), *cert. denied,* 121 S.Ct. 2535 (2001).

G. ***United States v. Tran,*** 234 F.3d 798 (2d Cir. 2000).

H. ***Grosso v. United States,*** 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 902 (1968).

I. ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).

J. ***Marchetti v. United States,*** 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968).

K. ***United States v. R.L.C.,*** 503 U.S. 291, 112 S.Ct. 1329, 117 L.Ed.2d 559 (1992).

II. As to whether the United States Sentencing Guidelines are statutes?

A. ***United States v. R.L.C.,*** 503 U.S. 291, 112 S.Ct. 1329, 117 L.Ed.2d 559 (1992).

III. As to whether plain error review applies where the law in support of the issue raised was not decided until after the Petitioner/Defendant's trial and sentencing?

A. ***Grosso v. United States,*** 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 902 (1968).

B. ***Marchetti v. United States,*** 390 U.S. 39, 88 S.Ct.

697, 19 L.Ed.2d 889 (1968).

C. ***United States v. Candelario,*** 240 F.3d 1300 (11th Cir.), *cert. denied,* 121 S.Ct. 2535 (2001).

D. ***United States v. Swatzie,*** 288 F.3d 1278 (11th Cir. 2000).

E. ***Jones v. United States,*** 224 F.3d 1251 (11th Cir. 2000).

F. ***Harris v. United States,*** 149 F.3d 1304 (11th Cir. 1998).

RHONDA A. ANDERSON, ESQ.

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certifies that the type size and style in this brief is 14 point Times New Roman Scalable type.

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147 L.Ed.2d 435 (2000) ..... i, ii, 1, *passim*

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155 F.3d 1318 (11th Cir. 1998) 15
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967 F.2d 483 (11th Cir. 1992) 15
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- F.3d -, 2001 WL 951273
(9th Cir., Aug. 23, 2001) ii,6,11
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259 F.3d 363 (5th Cir. 2001),
rehrg en banc granted, - F.3d -,
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United States v. Meacham,
626 F.2d 503 (5th Cir. 1980) 15
United States v. R.L.C.,
503 U.S. 291, 112 S.Ct. 1329,
117 L.Ed.2d 559 (1992) ii,10

United States v. Swatzie,
228 F.3d 1278 (11th Cir. 2000) ..... ii, 4-5,12
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United States v. Woodard,
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Walker v. Mortham,
158 F.3d 1177 (11th Cir. 1998),
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OTHER AUTHORITIES:

U.S. Constitution:
Fifth Amend. 9
Sixth Amend. 9
United States Code:
18 U.S.C. § 1326(b)(2) 8
21 U.S.C. § 841 11
21 U.S.C. § 841(a)(1) 5,8
21 U.S.C. § 841(b) 7,11
21 U.S.C. § 841(b)(1)(D) 6
21 U.S.C. § 952(a) 5
21 U.S.C. § 960 7,11
26 U.S.C.A. § 4411 13
28 U.S.C. § 2106 14
U.S.S.G. § 2D1.1(a) 3,8

STATEMENT OF THE ISSUES

II. WHETHER THE DISTRICT COURT LACKED JURISDICTION TO IMPOSE ANY SENTENCE DUE TO THE FAILURE OF THE INDICTMENT TO ALLEGE A SPECIFIC PENALTY PROVISION AND/OR THE QUANTITY OF DRUGS?

II. WHETHER BASED UPON THE RELEVANT INQUIRY IN *APPRENDI,* TITLE 21 U.S.C. 841 AND TITLE 21 U.S.C. 960 ARE UNCONSTITUTIONAL, BECAUSE EACH EXPOSE A DEFENDANT TO A GREATER PUNISHMENT THAN AUTHORIZED BY THE JURY'S GENERAL GUILTY VERDICT?

III. WHETHER THIS COURT'S ANALYSIS OF THE *APPRENDI* CLAIMS IMPROPERLY APPLIES A PLAIN ERROR STANDARD OF REVIEW FOR DEFENDANTS TRIED AND SENTENCED BEFORE *APPRENDI* OR *JONES* WERE CONSIDERED OR DECIDED BY THE UNITED STATES SUPREME COURT, AND BEFORE ANY AUTHORITY IN THIS CIRCUIT PROVIDED GROUNDS FOR SUCH RELIEF?

STATEMENT FACTS NECESSARY FOR REHEARING

Both the trial and sentencing hearing[1] in this cause were held well before the Supreme Court decided ***Apprendi v. New Jersey,*** 530 U.S. 466, 120 S.Ct. 2348,

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[1]Mr. Beharry's trial concluded on November 1, 1999, and his sentencing occurred on March 13, 2000. (R-586-2870-72, R-549).

147 L.Ed.2d 435 (2000).[2]

Mr. Beharry's indictment did not charge, nor did the jury find, any amount of drugs attributable to *Mr. Beharry*. (R-179; R-514; R.E. 2). Throughout the trial, *Mr. Beharry* vigorously challenged the allegations and testimony against him. Likewise, at sentencing, *Mr. Beharry* vigorously objected in writing and orally to both the factual allegations in the PSI Report, as well as the proposed drug quantity in the PSI. (R-545, 546, 548, 587).

The vast majority of the drugs that the trial court attributed to *Mr. Beharry* at sentencing came from incidents that were part of the broad conspiracies that the jury acquitted *Mr. Beharry* of. (R-545, 587). Moreover, *Mr. Beharry* argued at sentencing that the evidence presented at trial failed to show – beyond a reasonable doubt – that the drug quantities subsequently alleged in the PSI Report were attributable to *Mr. Beharry*.

Notably, the same drug quantities that this Court opined that the jury must have concluded that *Beharry* possessed in order to convict him of the substantive offenses, the jury necessarily found incredible and rejected as sufficient evidence to show that *Mr. Beharry* conspired to commit the substantive charges he was convicted of. Thus, *Mr. Beharry's* acquittal of the conspiracy charges regarding the same drugs bars this Court's inference that "no rational jury could have

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[2]Decided June 26, 2000 - three months after *Beharry's* sentencing. (R-549).

convicted *Beharry* of those [substantive] offenses without also finding that he imported and possessed with intent to distribute at least five kilograms of cocaine...." *Opinion,* at 8.

The Government did not request a special jury instruction or verdict form for the jury to determine drug quantity, and, therefore, the Record is silent as to whether the jury found – beyond a reasonable doubt – that *Mr. Beharry* imported and/or possessed with the intent to distribute over five kilograms of cocaine into the United States. Thus, the jury *not* to determine that at least five (5) kilograms of cocaine were attributable to Mr. Beharry – by any burden of proof whatsoever.

Additionally, this Court's conclusion that the counsel's alternative argument at sentencing was a "concession" is misplaced. That fall-back position was presented at sentencing only after the trial court flatly rejected all of *Beharry's* earlier factual objections as to drug quantity, which clearly were not argued or "conceded" at trial. *See, Beharry's Reply Brief,* at 8-9.

During the sentencing hearing on March 13, 2000, the District Court found that over 150 kilograms of cocaine were attributable to *Mr. Beharry* based upon the combination of testimony that was presented at the sentencing hearing (and not the petit jury) and the trial testimony. (R-3038). Thus, even though the jury never found beyond a reasonable doubt that the threshold amounts in the charging statute or the Sentencing Guidelines necessary to sentence *Mr. Beharry* to life imprisonment, the trial court imposed the harshest sentence available on a indictment that merely charged

Mr. Beharry with a "detectable amount" of cocaine.

As a result, as a Criminal History Category I first offender, *Beharry's* total offense level under Section 2D1.1 before any other adjustments are made, was a level 38,[3] which required an imprisonment range of 235-293 months. (R-3038).

ARGUMENT

This Court misapplied ***United States v. Swatzie,*** 228 F.3d 1278 (11th Cir. 2000), to the instant case to hold that "no rational jury could have convicted Beharry" for importation and/or possession with intent to distribute,

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[3]Under USSG 2D1.1, a quantity of 150 kg or more of cocaine requires an offense level of 38 with a Category I sentencing range of 235 to 293 months (19½ to 24½ years). However, if the jury had found that only five kilograms were attributable to *Beharry* beyond a reasonable doubt, then 2D1.1 would provide for an offense level of 32 with a sentencing range of 121-151 months (approx. 10 to 15 ½ years). Thus, even after a five level increase to level 37 (210-262 months), *Mr. Beharry's* sentence would have fallen below life imprisonment. However, as argued *infra,* because the indictment did not allege any quantity of cocaine or any penalty provisions, the trial court lacked jurisdiction to sentence *Beharry* to more than a "detectable" amount of cocaine (to-wit: level 12), and the trial court could not use any of the evidence of drug quantity adduced at trial to support a finding for a higher drug quantity than charged in the indictment.

"without also finding that he possessed with intent to distribute at least 5 kilograms of cocaine, a quantity sufficient to support a life sentence under 21 U.S.C. §§ 841(b) and 960(b)," - which were not charged in the indictment. *Opinion* at 9.

First, in contrast to the case at bar, in ***Swatzie,*** the indictment specifically alleged the penalty provision for the offense charged. 228 F.3d at 1280. Second, unlike ***Swatzie,*** *Mr. Beharry* never conceded that a plain error analysis applied. 228 F.3d at 1281. Additionally, ***Swatzie,*** a panel decision, did not properly overrule prior precedent holding that a sentence that exceeds the statutory maximum is reversible *per se.* Further, ***Swatzie*** failed to properly raise a Fifth Amendment argument that his constitutional rights were violated due to the grand jury's failure to find probable cause as to drug quantity. *Id.* Additionally, unlike the case at bar, the evidence in ***Swatzie*** was uncontradicted, (228 F.3d, at 1279), and ***Swatzie*** never "put the amount of and form of cocaine at issue by objecting to the presentence report's findings as to these two facts." 228 F.3d, at 1280. Thus, ***Swatzie*** is both legally and factually distinguishable from the instant case.

Further, as noted in the statement of facts, *supra,* the evidence at trial regarding drug quantities was vigorously disputed not inferible from the jury's guilty verdict on the substantive offenses, because *(a)* the indictment failed to charge *Beharry* with any specific quantity of drugs, *(b)* the jury was not instructed that it must find a quantity of drugs beyond a reasonable doubt, or by any standard, and *(c)* the jury's acquittal of

Beharry of the overarching conspiracy charges demonstrated that the jury found the Government's witnesses incredible. Thus, *Mr. Beharry's* acquittal of the conspiracy charges regarding the same drugs bars this Court's inference that "no rational jury could have convicted *Beharry* of those [substantive] offenses without also finding that he imported and possessed with intent to distribute at least five kilograms of cocaine...." *Opinion*, at 8.

This Court also failed to address *Beharry's* arguments that:

(1) the trial court did not have jurisdiction to base his sentence on 150 kilograms of cocaine where the indictment only charged him with "detectable" quantity of cocaine,

(2) that this Court lacked jurisdiction to sentence *Mr. Beharry* where the Counts of conviction for the narcotics offenses only charged him with violations of Title 21 U.S.C. 952(a) and 21 U.S.C. 841(a)(1), and did not charge him with any penalty provisions,

(3) that the quantity of drugs *Mr. Beharry's* sentence was based on had to be determined by the jury, beyond a reasonable doubt -- and not by a trial court, or a jury by a lesser burden of proof,

(4) that the "plain error" standard of review is not applicable for ***Apprendi*** errors, and

(5) that the "credible evidence" does not show beyond a reasonable doubt that a 150 kilograms or more of cocaine is attributable to *Mr. Beharry*.

Furthermore, rather than the plain error vs.

preserved error analysis that this Court adopted in ***United States v. Candelario,***[4] a *per se* reversible error standard must be applied – especially for defendants like *Beharry* who were tried and sentenced before the Supreme Court's decision in ***Apprendi.***

Additionally, after this Court's decision herein, decisions of the Fifth and the Ninth Circuit were issued that conflict with this Circuit's precedent as follows:

In ***United States v. Buckland,*** 259 F.3d 1107 (9th Cir. Aug. 9, 2001), the Ninth Circuit held that determinate sentencing provisions of the federal narcotics statutes which permit a judge to find, under a preponderance of evidence standard, a fact that increases a maximum penalty to which a defendant is exposed, are unconstitutional. *See also,* ***United States v. Hitchcock,*** - F.3d -, 2001 W.L. 951273 (9th Cir., Aug. 23, 2001)(same).

In ***United States v. Longoria,*** 259 F.3d 363 (5th Cir., 2001), *rehrg en banc granted*, - F.3d -, 2001 WL 946413 (5th Cir., Aug. 15, 2001), the Fifth Circuit held that the failure of indictment to charge a drug quantity and specific reference in the indictment to 21 U.S.C. 841(b)(1)(D) deprived the district court of jurisdiction to sentence defendant to more than 5 years incarceration).

Additionally, the Fifth Circuit held in ***United States v. Gonzalez,*** 259 F.3d 355, 359 (5th Cir .2001), *reh'g en banc granted* (5th Cir. Aug. 15, 2001), that where an indictment does not allege a drug quantity, the evidence

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[4]240 F.3d 1300 (11th Cir.), *cert. denied,* 121 S.Ct. 2535 (2001).

adduced at trial supporting the trial court's finding of drug quantity is not relevant. *See also,* ***United States v. Baptiste,*** - F.3d - , 2001 WL 1006712 (5th Cir. Aug. 31, 2001)(same), and ***United States v. Tran,*** 234 F.3d 798 (2d Cir. 2000).

Accordingly, *Mr. Beharry* petitions this Court for rehearing, and rehearing *en banc,* as follows:

I. THE DISTRICT COURT LACKED JURISDICTION TO IMPOSE ANY SENTENCE DUE TO THE FAILURE OF THE INDICTMENT TO ALLEGE A SPECIFIC PENALTY PROVISION AND/OR THE QUANTITY OF DRUGS.

The four substantive counts of conviction did not notify *Mr. Beharry* of any specific penalty provisions for importation under 21 U.S.C. §§ 960(a)(1) and (b), or possession with intent to distribute under 21 U.S.C. §§ 841(b).[5] Further, the indictment only charged *Beharry* with a "detectable amount of cocaine," and never alleged the threshold quantity required to satisfy the elements of the charging statutes.

Additionally, neither the jury instructions or verdict forms required the jury to determine if the quantity of

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[5]Specifically, Count III (renumbered as Count II) or Count IV (renumbered as Count III) of the indictment never alleged that the relevant penalty provisions for importation, to-wit: 21 U.S.C. §§ 960(a)(1) and (b). Similarly, Counts VII (renumbered as Count V) and Count VIII (renumbered as Count VI) never alleged that the relevant penalty provisions for the offense of possession with the intent to distribute, to-wit: 21 U.S.C. §§ 841(b).

drugs attributable to *Beharry* were 150 kilograms or more to warrant an application of Guideline Level 38 under Section 2D1.1, or five (5) kilograms or more as required under Title 21 U.S.C. § 841(a)(1). As a result, the jury was not instructed to determine quantity by a reasonable doubt standard - or any standard at all.

The failure of indictment to allege the drug quantity or specific penalty provision deprived the District Court of jurisdiction to sentence the Appellant. Accordingly, the trial court lacked jurisdiction to impose any sentence. *See, e.g.*, ***United States v. Longoria,*** 259 F.3d 363 (5th Cir.)(failure of indictment to charge a drug quantity and specific reference to 21 U.S.C. 841(b)(1)(D) deprived the district court of jurisdiction to sentence defendant to more than 5 years incarceration), *rehrg en banc granted*, - F.3d -, 2001 WL 946413 (5th Cir., Aug. 15, 2001).

Inasmuch as the lack of jurisdiction may be raised at any time,[6] this issue was timely raised, and requires

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[6]The ***Apprendi*** Court did not address the indictment issue because the Presentment Clause of the Fifth Amendment has not been made applicable to the states via the Fourteenth Amendment. *See* ***Apprendi*** at 477 n. 3, 120 S.Ct. 2348. However, in ***Apprendi,*** the Court contrasted the state prosecution before it with the federal prosecution challenged in ***Almendarez-Torres v. United States***, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). *See* ***Apprendi,*** 530 U.S. at 477 n. 3, 120 S.Ct. 2348. In ***Almendarez-Torres,*** the Supreme Court stated that *if* 18 U.S.C. § 1326(b)(2) "constitute[d] a separate crime, then the Government must write an indictment that mentions the additional element." *See*

reversal of the conviction and sentence imposed herein. *Id.* *See* ***United States v. Gonzalez,*** 259 F.3d 355, 359 (5th Cir .2001), *reh'g en banc granted* (5th Cir. Aug. 15, 2001)(explained that because of the jurisdictional "nature" of the error, evidence of the drug quantity at trial or the defendant's acknowledgment of the quantity was irrelevant and could not cure the grand jury's lack of notice of the quantity element (which was an element only because it was used to enhance the sentence). *See id.* at 360 n. 3 .

Moreover, where an indictment does not allege a drug quantity, the evidence adduced at trial supporting the trial court's finding of drug quantity is "not relevant," and may not be used to enhance a defendant's sentence beyond what it charged in the indictment. *Id.* Thus, this Court's use of the drug quantities adduced at trial in affirming the sentence imposed, directly conflicts with ***Gonzalez.***

The Fifth Circuit's holdings in ***Longoria*** and

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523 U.S. at 226, 118 S.Ct. 1219. More importantly, the ***Apprendi*** Court explicitly adopted as its holding "the opinion that we expressed in [***Jones v. United States,*** 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)]." *Id.* at 490, 120 S.Ct. 2348. In ***Jones,*** a case involving a federal prosecution, the Court stated that the Fifth and Sixth Amendments require that "any fact (other than prior conviction) that increases the maximum penalty for a crime *must be charged in an indictment,* submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. at 243 n. 6, 119 S.Ct. 1215 (emphasis added)

Gonzalez, *supra,* comport with the ***Apprendi.*** As Justice Stevens stated in the lead opinion in ***Apprendi,*** it "'is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is expose.'" 120 S.Ct., at 2363 (quoting *Jones v. United States,* 526 U.S. 227, 252, 119 S.Ct. 1215, 1228 (1999)(Stevens, J., concurring)). Thus, as the dissenting justices explained, ***Apprendi*** would require:

> any fact (other than prior conviction) that has the effect, in real terms, of *increasing the maximum punishment beyond an otherwise applicable range* must be submitted to a jury and proved beyond a reasonable doubt . . . The principle thus would apply not only to schemes like New Jersey's, under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to *all determinate-sentencing schemes in which the length of a defendant's sentence withing the statutory range turns on specific factual determinations (e.g., the Federal Sentencing Guidelines).*

Apprendi, 120 S.Ct. at 2391 (O'Conner, J., with whom Rehnquiest, C.J., Kennedy and Bryer, JJ., join, dissenting)(emphasis added).

The application of the Sentencing Guidelines at *Mr. Beharry's* sentencing increased his punishment based on the existence of facts that the jury did not find beyond a reasonable doubt. Inasmuch as the

constitutional rule announced in ***Appréndi*** relied upon ***Jones***[7], and the sentence in ***Jones*** was struck down – even though it did not exceed the prescribed statutory maximum, the rule of ***Apprendi*** is not limited to those instances in which the increased penalty provisions exceed the statutory maximum of the charging statute. *E.g.*, ***United States v. R.L.C.,*** 503 U.S. 291, 112 S.Ct. 1329, 117 L.Ed.2d 559 (1992)(the Court rejected the Government's attempt to argue that an "authorized" sentence only refers to the penalty provisions in the charging statute, rather than the limitations imposed through the Sentencing Guidelines).

Therefore, each fact that increases a defendant's sentencing range, must be submitted to the jury and determined beyond a reasonable doubt. *See,* ***Apprendi,*** 120 S.Ct. at 2367 (Scalia, J., concurring),("all facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by a jury"), and ***Jones,*** *Id.,* at 243, n. 6, 119 S.Ct. 1215.

Additionally, due process and the constitutional right to trial by jury demand that facts that substantially increase the "legally prescribed punishment" be found

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[7]In ***Jones***, the Court noted that:

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Id., at 243, n. 6, 119 S.Ct. 1215.

by a jury and established beyond a reasonable doubt. Accordingly, the judgment and sentence of *Zimmern Beharry* must be reversed.

II. BASED UPON THE RELEVANT INQUIRY IN *APPRENDI*, TITLE 21 U.S.C. 841 AND TITLE 21 U.S.C. 960 ARE UNCONSTITUTIONAL, BECAUSE EACH EXPOSE A DEFENDANT TO A GREATER PUNISHMENT THAN AUTHORIZED BY THE JURY'S GENERAL GUILTY VERDICT.

After this Court's opinion, the Ninth Circuit examined Title 21 U.S.C. 841(b) in light of "the relevant inquiry" the Supreme Court set forth in ***Apprendi,*** to-wit: according to the effect of the statute, rather than its form, to determine whether it exposes a defendant to a greater punishment than authorized by the jury's guilty verdict. ***United States v. Buckland,*** 259 F.3d 1107, 2001 WL 893440, Slip Op. at 6 (9th Cir., Aug. 9, 2001). Based upon this analysis, the Ninth Circuit held that Section 841(b)(1)(A) and (b)(1)(B) were unconstitutional. *Id. See also,* ***United States v. Hitchcock,*** - F.3d -, 2001 W.L. 951273 (9th Cir., Aug. 23, 2001)(same).

The analysis the Ninth Circuit applied in ***Buckland*** and ***Hitchcock*** is equally applicable here, where *Beharry* is charged with violations of 21 U.S.C. §§ 841 and 952, and was sentenced based upon the uncharged sentencing provisions of Title 21 U.S.C. §§ 841(b) and 960. Therefore, *Beharry* adopts and incorporates herein the reasoning and analysis the Ninth Circuit applied in ***Buckland.*** *See,* ***App. "A."*** Both statutes exposed

Beharry to a greater punishment than the jury's general verdict permitted, and, thus, under the relevant inquiry of ***Apprendi***, are unconstitutional.

III. THIS COURT'S ANALYSIS OF *APPRENDI* CLAIMS IMPROPERLY APPLIES A PLAIN ERROR STANDARD OF REVIEW FOR DEFENDANTS TRIED AND SENTENCED BEFORE *APPRENDI* WAS CONSIDERED OR DECIDED BY THE UNITED STATES SUPREME COURT, AND BEFORE ANY AUTHORITY IN THIS CIRCUIT PROVIDED GROUNDS FOR SUCH RELIEF.

A. A Sentence Above the Statutory Maximum is Reversible Per Se

Before this Court issued its panel opinions in ***United States v. Swatzie,*** 228 F.3d 1278, 1281 (11th Cir.2000) and ***United States v. Candelario***, it was well established that a sentence above the applicable statutory maximum is reversible *per se,* without requiring proof of prejudice under a "plain error" standard of review. *See,* ***Jones v. United States,*** 224 F.3d 1251 (11th Cir.2000)(general sentence exceeded statutory maximum for a count, *citing* ***United States v. Woodard,*** 938 F.2d 1255 (11th Cir. 1991) criticizing lower court for denying relief based on fact that defendant suffered no prejudice; "The test ... is not what the court [or jury] might have done; the test is whether the original sentence comported with the law").

Inasmuch as ***Swatzie*** was not decided *en banc*, it cannot overrule a prior panel decision and require an Appellant to satisfy a "plain error" hurdle after an

Appellant demonstrated such a sentencing error exists. "[O]nly the court of appeals sitting *en banc* or the United States Supreme Court can overrule a prior panel decision." ***Woodard,*** 938 F.2d at 1258. Additionally, where this court is presented with two conflicting cases decided by three-judge panels of the circuit, the earlier case controls. ***Walker v. Mortham***, 158 F.3d 1177, 1188-89, 1189 n. 25 (11th Cir. 1998)(choosing "earliest case" conflict resolution rule because of the importance of the prior precedent rule; "earliest case" rule brings budding intracircuit splits to a "screeching halt"), *cert. denied,* 528 U.S. 809 (1999). Even where the court is not dealing with directly controlling precedent, but rather, with precedent by analogy, "the same rule of *stare decisis* must be applied." ***United States v. Edelman,*** 873 F.2d 791, 794 (11th Cir. 1989).

Additionally, even where an appellant raises an issue on appeal for the first time that was not available at the time of trial or sentencing, a plain error standard of review is inappropriate and denies the Appellant due process and equal protection under the law. *See,* ***Harris v. United States,*** 390 F.2d 616 (8th Cir. 1968), in which the Court reversed the defendant's conviction, even though the issue was only raised on direct appeal. In ***Harris,*** after oral argument, the Supreme Court decided ***Marchetti v. United States,*** 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968), and ***Grosso v. United States,*** 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 902 (1968), in which the Court held that the wagering tax provisions of Title 26 U.S.C. may not be enforced by criminally punishing

those individuals who have properly asserted their privilege against self-incrimination in defense of their noncomplicance with the provisions.

Harris was convicted of operating a lottery without paying the occupational tax imposed 26 U.S.C. § 4411. In his appellate brief, Harris raised for the first time an assertion that criminal enforcement of the wagering tax statutes violates his right against self-incrimination.

Although Harris failed to raise at trial an assertable defense, to-wit: his privilege against self-incrimination. Nonetheless, the Eighth Circuit wholly reversed Harris' conviction. The court relied upon the Supreme Court's reasoning in ***Grosso***[8] in which the Supreme Court felt the Appellant's failure to raise the issue below was understandable and did not constitute a waiver of his ability to assert constitutional right on direct appeal, and was reversed because the appellant did not have the benefit if the Court's new decisions at trial. *Id.*, at 71.

B. <u>Plain Error Analysis Never Applies to Jurisdictional Errors</u>:

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[8]***Harris*** noted that 28 U.S. C. §2106 provides courts with the authority to:

> affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it fore review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances.

390 F.2d at 617.

Where the grand jury fails to find probable cause as to all of the elements of the enhanced offense such as Title 21 U.S.C. §841(b)(1)(A), the grand jury's omission of an element is a jurisdictional defect, resulting in reversible error *per se* without proof of prejudice. *See,* ***United States v. Alvarez,*** 735 F.2d 461,468 (11th Cir. 1984)(present indictment cannot properly serve as the basis for sentences in excess of five years, where quantity element is absent from indictment).[9] *See also,* ***Stirone v. United States,*** 361 U.S. 212, 217, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960)(deprivation of right to be tried only on charges returned by grand jury "is far too serious to be treated ... as harmless error"); ***United States v. Gayle,*** 967 F.2d 483,485 (11th Cir.1992)(*en banc*); ***United States v. Fern,*** 155 F.3d 1318,1324-25 (11th Cir.1998); ***United States v. Meacham,*** 626 F.2d 503,510 (5th Cir.1980)(objection that indictment fails to charge an offense is a non-waivable jurisdictional defect).

Accordingly, this Court application of a plain error standard of review upon a defendant that did not have the benefit of the ***Apprendi*** decision at trial is improper.

CONCLUSION

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[9] Although ***Alvarez*** has not been followed in this Circuit since ***United States v. Coy,*** 19 F.2d 629 (11th Cir. 1984), the court in ***United States v. Maslin,*** - F. Supp.2d -, 2000 WL 1294254 (N.D.N.Y. Sept. 14, 2000)(No. 99-CR-159-7), held that after ***Apprendi,*** "it appears that the validity of ... ***Alvarez*** ... has been reinstated").

Based on the foregoing reasons and authorities, the Appellant, *Zimmern Beharry*, respectfully requests that his convictions and sentence be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed on September 14, 2001, to: ***Sangita K. Rao, Esq.,*** U.S. Department of Justice, P. O. Box 899, Benjamin Franklin Station, Washington, D.C. 20044-0899.

RHONDA A. ANDERSON, ESQ.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-11371-JJ

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ZIMMERN BEHARRY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

October 22, 2001

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC.

(Opinion_____, 11th Cir., 19__, __F.2d____)

Before:BARKETT and HULL, Circuit Judges, and LIMBAUGH*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

*Honorable Stephen N. Limbaugh, U.S. District Judge for the Eastern District of Missouri, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-11371-JJ

District Court Docket No. 94-06015-CR-DTKH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ZIMMERN BEHARRY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: July 6, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

ISSUED AS MANDATE: OCT. 30, 2001
U.S. COURT OF APPEALS
ATLANTA, GA

CONSTITUTIONAL PROVISIONS & STATUTES

U. S. Const., amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

21 U.S.C. § 841(a) - Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 841(b) - Penalties - (Excerpt)[1]

Except as otherwise provided in section 859, 860, or 861 of

---

[1] The excerpts include penalties for cocaine only.

this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

* * *

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859,

860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

* * *

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the

provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, . . . except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in

accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

21 U.S.C. § 846 - Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

U.S.S.G. § 2D1.1 (Excerpt)[2]

§ 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy.

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1),

---

[2]The excerpts include penalties for cocaine, but not cocaine base.

(b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

(4) If (A) the offense involved the importation of methamphetamine or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels.

(5) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

(6) If the defendant meets the criteria set forth in subdivisions (1) to (5) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and the offense level determined above is level 26 or greater, decrease by 2 levels.

(c) DRUG QUANTITY TABLE

	Controlled Substances and Quantity	Base Offense Level
1	* * *	Level 38
	•150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
2	* * *	Level 36
	•At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
3	* * *	Level 34
	•At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
4	* * *	Level 32
	•At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
5	* * *	Level 30
	•At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
6	* * *	Level 28
	•At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
7	* * *	Level 26
	•At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
8	* * *	Level 24
	•At least 400 G but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	

9	* * *	Level 22
	•At least 300 G but less than 400 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
11	* * *	Level 18
	•At least 100 G but less than 200 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
12	* * *	Level 16
	•At least 50 G but less than 100 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
13	* * *	Level 14
	•At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
14	* * *	Level 12
	•Less than 25 G Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	
	* * *	

(3)

Supreme Court, U.S.
FILED

NO. 0 1 1 1 6 5 JAN 2 2 2002

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ZIMMERN BEHARRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX 2 TO PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

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9788

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 22d day of January 2002, to: ***Sangita K. Rao, Esq.,*** U.S. Department of Justice, P. O. Box 899, Benjamin Franklin Station, Washington, D.C. 20044-0899; and ***Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 00-11371-J
UNITED STATES OF AMERICA,
Plaintiff/Appellee,
v.
ZIMMERN BEHARRY,
Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

APPELLANT'S INITIAL BRIEF

CRIMINAL APPEAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Zimmern Beharry
Case No. App. No. 00-11371-J

Pursuant to 11th Cir. R. 26.1, Appellant Zimmern Beharry files this Certificate of Interested Persons and Corporate Disclosure Statement:

Atkinson, Karen, Assistant United States Attorney

Beharry, Zimmern, Defendant/Appellant

Black, Roy, BLACK, SREBNICK & KORNSPAN, Attorney for Appellant

Hurley, Daniel T.K., United States District Judge

Ng, Christine, BLACK, SREBNICK & KORNSPAN, Attorney for Appellant

Perczek, Jacqueline, BLACK, SREBNICK & KORNSPAN, Attorney for Appellant

Reinhart, Bruce, Assistant United States Attorney

Rao, Sangita, Esq., Department of Justice, Criminal Appellate Section

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully submits that oral argument would be helpful to the just resolution of this appeal and will significantly enhance the decision making process. The application of the United States Supreme Court's recent decisions in Apprendi and Castillo to the federal drug laws and Sentencing Guidelines is an issue of first impression and very significant. Further, this is a complex case with a large number of issues, many of which are fact-intensive. Oral argument would also assist this Court to resolve any ambiguities in the record.

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STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because the Defendant was charged with an offense against the laws of the United States. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which give the courts of appeals jurisdiction over all final decisions and sentences of the district courts of the United States. This appeal was timely filed on March 16, 2000. (R-552).

INTRODUCTION

Defendant/Appellant ZIMMERN BEHARRY, will be referred to as he stands before this Court, as he stood before the trial court, and by name. Appellee, the UNITED STATES OF AMERICA, will be referred to as the government.

At the time this brief was finalized, undersigned counsel had not yet received an index to the record prepared by the district court. Therefore, the record volume numbers were not available for citation. Pursuant to 11th Cir. R. 28-4, citation to the record will be to the district court document number and page number.

Emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE ISSUES

I. WHETHER MR. BEHARRY WAS ENTITLED TO HAVE THE JURY DECIDE DRUG QUANTITY BY PROOF BEYOND REASONABLE DOUBT.

II. WHETHER THE DISTRICT COURT ERRED BY GIVING AN ALLEN CHARGE WHEN ONE JUROR HAD EXPRESSED FEAR FOR HER SAFETY IN THE JURY ROOM.

III. WHETHER THE GOVERNMENT'S PATTERN OF MISCONDUCT SEVERELY PREJUDICED MR. BEHARRY AND REQUIRES DISMISSAL OF THE INDICTMENT OR AT LEAST A NEW TRIAL.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a judgment and sentence based on a jury verdict finding Zimmern Beharry guilty of possession and importation of cocaine. (R-514; R-549; R.E. 4). Although the government charged Mr. Beharry with participating in a broader conspiracy to possess and import cocaine, the jury hung on those counts and convicted him only of involvement in two specific importations occurring on February 2 and February 10, 1994. Perhaps the most troubling aspect of this case, however, are the deliberate misrepresentations and omissions by the government throughout this prosecution. Mr. Beharry is currently serving a sentence of life in prison.

Statement of the Case. Mr. Beharry was initially indicted on ten counts of conspiracy to possess and import cocaine into the United States. See (R-147; R-179; R.E. 2). After the grand jury handed down the

indictment, the government sought Mr. Beharry's extradition from Trinidad and Tobago. See (R-529).

The court in Trinidad did not simply rubber-stamp the United States' extradition request. Of the ten counts in Mr. Beharry's indictment, the court in Trinidad refused to extradite on counts nine and ten, finding insufficient evidence to support those counts. See (R-272, 277; R.E. 3).

This case proceeded to trial in October 1999 in the Southern District of Florida on six counts: conspiracy to import cocaine into the United States from September 1, 1993 to February 10, 1994; importation of cocaine on February 2, 1994; importation of cocaine on February 10, 1994; conspiracy to possess cocaine from September 1, 1993 to February 10, 1994; possession of cocaine on February 2, 1994; possession of cocaine on February 10, 1994. See (R-579). None of these charges alleges specific quantities of cocaine. See (R-179).

On Friday, after several days of deliberations, the district court received several notes from the jury. One stated that "we have considered only one count and we are stuck." (R-585-2810). The second note stated that Juror 8 "does not feel safe in the jury room" and needed the bailiff. (R-585-2810).

The district judge spoke to Juror 8, Carol Best, out of the presence of the other jurors. (R-585-2832). She was very upset and crying. See (R-585-2833, 2836). When the district court questioned Ms. Best, she expressed her fear for her physical safety. (R-585-2834-36). Although to that point only loud and foul

language had been used, Juror Best believed the argument "could move to something more physical." (R-585-2834-36).

The district court decided to adjourn until Monday, hoping the weekend would cool things down. See (R-585-2838). Before releasing the jurors for the weekend, the judge cautioned them to remain civil to each other during deliberations. (R-585-2840).

The jury continued deliberations on Monday. (R-586) The court then received a note that said "we are unanimous on Count 5, we are hung on counts 2, 3, 4, 6, and feel we cannot make any further progress, this is unanimous."[1] (R-586-2846). Over defense objection that it would be unduly coercive and single out Juror Best, the district court gave the jury a modified Allen charge. (R-586-2856-57). The district court denied the defense motion for mistrial. (R-586-2867).

The jury returned a verdict later that same day finding Mr. Beharry guilty of the counts that charged importation and possession of cocaine on two specific dates: February 2 and February 10, 1994. (R-514; R-586-2871). The jury hung on the two conspiracy counts. (R-514; R-596-2871). The district court denied Mr. Beharry's post-trial motions to dismiss, for repatriation, for judgment of acquittal and for a new trial. (R-538). Mr. Beharry was sentenced under the

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[1]Note that the "counts" as listed on the verdict are not numbered the same as the counts in the Fifth Superceding Indictment. Compare (R-179) with (R-514).

Guidelines to life in prison.[2] (R-549). This appeal followed. (R-552).

The trial. Through the testimony of government agents and numerous cooperating witnesses, the government sought to prove that Mr. Beharry was part of a broad conspiracy to import cocaine from Trinidad and Tobago. The government's witnesses testified about several alleged importations involving Mr. Beharry, some of which were outside the scope of the indictment and were admitted under Federal Rule of Evidence 404(b). See (R-572-398; R-573-522; R-574-756; R-575-1158; R-576-1314; R-577-1502). The government's evidence also included tape-recorded conversations, allegedly between Mr. Beharry and the Trinidadian police. See (R-576-1296, 1299; R-578-1862). In these tapes, a man alleged to be Mr. Beharry, told the police that he exported drugs to the United States.[3] See, e.g., (R-576-1229, 1231, 1309; R-578-1862). Despite this evidence, however, the jury did not convict Mr. Beharry of the broader conspiracy counts, but only of possessing and importing cocaine on two

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[2]The remaining counts of the indictment were dismissed. (R-549, 554).

[3]Facts relating to testimony of Trinidadian Officer McAlpin to a similar statement allegedly made by Mr. Beharry during a traffic stop in 1992 and not disclosed to the defense prior to trial will be addressed in the argument portion of the brief.

specific occasions: February 2nd and February 10th, 1994.

The testimony regarding these two importations came primarily from cooperating government witnesses David Nash and Wade Lalla,[4] and DEA agent Duffy. Nash and Lalla testified that they met with Mr. Beharry in Trinidad in early 1994. (R-576-1327; R-571-1516). According to Nash, Mr. Beharry told him that Lalla and a man he just knew as Carlos would be participating in a drug operation in Miami, Florida. (R-576-1327, 1474). Mr. Beharry gave Nash half of a dollar bill to use as identification. See (R-576-1329; R-577-1517). Lalla never saw Zimmern Beharry personally deliver cocaine. See (R-577-1556).

Lalla flew to Miami from Trinidad on January 31, 1994. (R-577-1522). Nash also flew to Miami and checked into a hotel where he was contacted by Lalla and Carlos. (R-576-1329-30; R-577-1553). They were having trouble collecting the money to give to the couriers for the drugs, so they called a man in New York named Ronny Rampresad and he flew down with the money. (R-576-1330; R-577-1553).

On February 2, 1994, Nash, Lalla, and Carlos went to the docks at Port Everglades to greet the ship "Hyber Intrepid" from Trinidad. (R-576-1330; R-577-1525). According to Nash, they were to pick up 30 kilograms of cocaine from the couriers, only 20 kilos of which

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[4]Lalla and Nash also testified about other importations they participated in, allegedly for Mr. Beharry. (R-576-1316-26; R-577-1505-15).

were Mr. Beharry's. (R-576-1331); see also (R-577-1524). Nash went to the docks in a taxicab. (R-576-1332). Lalla and Carlos went separately in another vehicle. (R-577-1526). Nash had the cab wait while he went on board the ship, went to the couriers' cabin, showed them his half-dollar, and paid the money. (R-576-1332). One of the couriers collected the drugs and put it in the taxicab. (R-576-1333). Nash was arrested when he went back to the cab. (R-576-1333).

Lalla and Carlos watched Nash approach the vessel. (R-577-1526). According to Lalla, he was on his cellular phone reporting to Mr. Beharry the whole time. (R-577-1526). He saw Nash being arrested and told Mr. Beharry. (R-577-1526). According to Nash, Mr. Beharry told them to leave the area and lie low for a while so they could retrieve the second shipment. (R-577-1528). In that shipment, the drugs were loaded into containers and placed on a ship in Trinidad. (R-577-1519). The containers were to be off-loaded in Miami and taken to a bonded warehouse. (R-577-1519).

Lalla testified that Mr. Beharry told him to retrieve the drugs from a man named Chris Beecham. (R-577-1528-30). Lalla took a taxicab to Beecham's house. (R-577-1531). Lalla carried a duffle bag with him. (R-577-1531). Beecham did not want to put the drugs into the duffle bag with the taxicab waiting, so Lalla went back to the hotel and returned with his rental car. (R-577-1531). When he returned, he put the duffle bag with the drugs in his car. (R-577-1533). Lalla was intercepted and arrested while driving away from Beecham's house. (R-577-1535). Thirty-six kilograms

of cocaine were seized from Lalla's car. (R-578-1747).

Defense counsel sought production of David Nash's passport, which Nash had turned over to the government. (R-576-1389, 1397; R-577-1456-57). Defense counsel sought production of the passport because by showing where and when Nash actually traveled, it would show that events did not happen when or as Nash testified. See (R-576-1389-92). The district court ordered that it be turned over to the defense. (R-576-1391; R.E. 7-2). The government never produced it. See (R-577-1397; R-530-14).

Lalla was placed in the federal witness protection program. (R-577-1539). In addition to funds he was given as part of that program, he received money from the DEA. (R-577-1560, 1604, 1610). He was also reimbursed for living expenses. (R-578-1663-64). However, according to a DEA receipt, Lalla was also paid $5,000 cash in exchange for "securing the indictment" of Zimmern Beharry. See (R-534; R-577-1607; R.E. 8).

DEA Agent Edward Duffy also testified about the events leading up to the arrest of Wade Lalla. (R-578-1737). According to Duffy, when Lalla returned to Beecham's house in the rental car, he was followed by a white van. (R-578-1814). When Lalla was arrested, the white van was neither stopped nor followed. (R-578-1815). Initially, because of DEA policy, Duffy refused to testify about why he ordered that the white van not be stopped. (R-578-1818). He only continued after being instructed to do so by the court. (R-578-1818-19). Then, for the first time, Agent Duffy testified that the

person in the white van, one of whom had been with Lalla at the dock at Port Everglades, was a confidential source by the name of Carlos Manickchand. (R-578-1820-22).

This testimony was significant because Agent Duffy's testimony before the grand jury and in the separate trial of co-defendant Ronald Rampresad, and the affidavits of DEA Agents Duffy and Mancini, and AUSA Boma, all of which were included with the extradition request to Trinidad, contained the same statement made under oath: With Wade Lalla during the February 1994 importations was an unidentified, unknown male co-conspirator, later identified as "Carlos Manaracha," who was a fugitive and who was being sought for arrest. (R-533-Exh.E, Exh.F, Exh.G, Exh.H; R-578-1835). Duffy told the grand jury that this allegedly unknown co-conspirator was not pursued because the agents lacked the manpower at the time. (R-578-1840-43). He also stated that the people who cooperated on arrest, such as Lalla, had identified the "unknown" man as Carlos Manaracha. (R-578-1831). Agent Mancini and AUSA Boma gave similar statements under oath in their affidavits to the court in Trinidad. These statements conveyed the idea that there was an unknown fugitive co-conspirator involved with Mr. Beharry, and inferred that Mr. Beharry was involved in hiding this person and continuing to deal narcotics with this co-conspirator.

On cross-examination at trial, however, it finally came to light that not only was there no such person as Carlos Manaracha, in fact Duffy knew all long that the

man with Lalla was actually Carlos Manickchand, a government informant. (R-578-1827). Moreover, when Lalla was recalled to the stand during trial, he testified that he always knew the man's name was Manickchand, and never told the government authorities otherwise. (R-581-2369). AUSA Boma was also aware of the identity of this man at the time of his affidavit and that he was an informant, not a fugitive. (R-578-1836).

Inexplicably, Duffy continued to insist that this testimony was truthful, because he was making statements about a fictitious Carlos Manaracha, not Carlos Manickchand. (R-578-1830). Duffy also testified that without a court order, to protect his informant he would have continued to maintain that the man with Lalla was Carlos Manaracha, a fugitive. (R-578-1818-19). Significantly, AUSA Reinhart recognized that without the court's order, Duffy would not be answering "truthfully." (R-578-1819).

The government never disclosed the identity of this man to the defense before trial. See (R-529; R-578-1818-19). Even after the government disclosed that there was a confidential informant involved, the government never indicated that the confidential informant was the alleged fugitive co-conspirator with Lalla in February 1994 as discussed in the affidavits, even though that fact was known by both the DEA agents and AUSA Boma. See (R-578-1827, 1836).

The defense moved for judgment of acquittal at the close of the government's case. (R-580-2339). The defense also moved to dismiss the indictment on the grounds that it was purchased with the payment of

money to Wade Lalla and the use of perjured testimony of Agent Duffy. (R-580-2343). The defense also moved to suppress Lalla's testimony because of the payment and for a mistrial. (R-580-2343). The defense renewed its motions at the close of all evidence and post-trial. (R-581-2431; R-529; R-530). All these motions were denied. (R-581-2433; R-538).

Sentencing. In determining the quantity of drugs used to obtain the base offense level for sentencing, the district court, over objection, looked not only at the cocaine allegedly involved in the importations of February 2 and 10, 1994, but went beyond that and attributed to Mr. Beharry as part of the offense conduct large drug quantities from other alleged importations. (R-545; R-546; R-587). Some of the additional cocaine would have been part of the alleged conspiracy on which the jury could not reach a verdict. See (R-587-2884-2979). Some of it came from alleged importations that were even outside the time period of the alleged conspiracies. See (R-587-2884-2979). Most of the evidence used to support the drug quantity came from the testimony of cooperating government witnesses. See (R-587-2884-2979). The total assigned to Mr. Beharry was therefore over 150 kilograms, making his base offense level 38. (R-587-3038). The district court found this drug quantity by a preponderance of the evidence. (R-587-2957-58).[5]

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[5]Defense counsel objected to the sources of information used to support the drug quantity assessment, the standard of proof, and the amount itself. See (R-545; R-546; R-557; R-587-

The district court over objection, enhanced Mr. Beharry's sentence by four levels for his role in the offense and two levels for possession of a firearm. (R-587-2999, 3009; R-549). As a result, Mr. Beharry was assigned the highest level, 43, and sentenced to life in prison. (R-549).

STANDARD OF REVIEW

This Court's review of a district court's decision to give an Allen charge is limited to evaluating the coercive impact of the charge. United States v. Elkins, 885 F.2d 775, 783 (11th Cir. 1989).

Review of an extradition order presents legal questions concerning interpretation of a treaty and is subject to plenary review. United States v. Puentes, 50 F.3d 1567 (11th Cir. 1995).

Denial of a motion to dismiss an indictment is reviewed for an abusive discretion. See United States v. Pielago, 135 F.3d 703, (11th Cir. 1998).

This Court will reverse because of discovery violation where it resulted in substantial prejudice. United Sttes v. Camargo-Vergara, 57 F.3d 993 (11th Cir. 1995).

Denial of a motion for new trial is reviewed for abuse of discretion. United States v. Pistone, 177 F.3d 957 (11th Cir. 1999).

2947). Although ruling that a preponderance of the evidence was the current standard, the court indicated the evidence would also meet a clear and convincing evidence standard. (R-587-2958).

SUMMARY OF THE ARGUMENT

This is an appeal from a judgment and sentence based on a jury verdict finding Zimmern Beharry guilty of possession and importation cocaine under 21 U.S.C. §§ 841 & 952. This case presents this Court with perhaps its first opportunity to address the application of the United States Supreme Court's recent decisions in Apprendi v. New Jersey and United States v. Castillo to the federal drug laws and Sentencing Guidelines. In this case, the indictment did not charge, nor did the jury find, any specific amount of drugs attributable to Mr. Beharry. During sentencing, the district court, over objection, determined drug quantity by a preponderance of the evidence. Because drug quantity is the single most important factor determining the penalty under both §841, §960, and the Sentencing Guidelines, it must be determined by a jury beyond a reasonable doubt. Mr. Beharry's conviction and sentence violate his Fifth and Sixth Amendment rights and he is entitled to a new trial.

Moreover, giving of the modified Allen charge in this case was unduly coercive. Speaking to the judge outside the presence of the other jurors, one juror expressed fear for her physical safety because of the level of hostility in the jury room. Under these circumstances, giving of an Allen charge was reversible error.

Perhaps the most troubling aspect of this case, however, are the deliberate misrepresentations and omissions by the government throughout this prosecution. Government agents lied under oath to

obtain Mr. Beharry's indictment and extradition and paid government witness Wade Lalla to secure the indictment. The government also failed to disclose a statement Mr. Beharry allegedly made to a Trinidadian police officer, misled the district court about when the prosecution had learned of that statement, and lost the passport requested to impeach another significant government witness. This Court should dismiss Mr. Beharry's indictment and repatriate him to Trinidad. At the least, this government misconduct requires a new trial.

ARGUMENT

I. MR. BEHARRY WAS ENTITLED TO HAVE THE JURY DECIDE DRUG QUANTITY BY PROOF BEYOND A REASONABLE DOUBT.

Mr. Beharry's indictment did not charge, nor did the jury find, any amount of drugs attributable to Mr. Beharry. (R-179; R-514, R.E. 2). Nonetheless, during sentencing, the district court attributed to Mr. Beharry amounts from numerous alleged importations, most of which were even outside the time period for the two possessions and importations for which he was convicted. (R-587-2884-2979). Over objection, the district court made that determination by a preponderance of the evidence. (R-587-2957-58). As a result, Mr. Beharry was sentenced to life. (R-549). Under the United States Supreme Court's recent decisions in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), and United States v. Castillo, 120 S.Ct. 2090

(2000), this was error. Drug quantity should be considered an element of the offense in §§841, 952 and 960. This Court should reverse and remand for a new trial.[6]

Historically, every fact that determined punishment was considered an element of the offense. See Apprendi, 120 S.Ct. at 2368-78 (Thomas, J. Concurring). Every element of a crime must be proved beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). However, in McMillan v. Pennsylvania, 477 U.S. 79 (1986), the Court, addressing a Pennsylvania firearm enhancement, ruled that there were some facts, termed "sentencing factors," that need not be found by a jury or beyond a reasonable doubt, but that could be used to determine the applicable sentence. The Court in McMillan and its progeny looked to legislative intent to determine whether the legislature intended a factor to be an element of the offense or merely a consideration in determining

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[6]As this case was tried pre-Apprendi, and following this Court's precedent, defense counsel did not request that the jury be permitted to determine drug quantity. However, defense counsel did object to the trial court's determining drug quantity by only a preponderance of the evidence. (R-587-2957). However, given the magnitude of this constitutional error, Mr. Beharry would be entitled to relief even under a plain error standard. See United States v. Walker, 59 F.3d 1196 (11th Cir.1995)(court would find plain error because of subsequent decision of the Supreme Court).

sentence. See id. at 86-88; see also Almendarez-Torres v. United States, 523 U.S. 224 (1998)(recidivism statute).

In Apprendi, the Supreme Court signaled a return to the original conception of what constitute elements of a crime. In that case, the defendant fired several shots into the home of an African-American family that had recently moved into that neighborhood. 120 S.Ct. at 2351. He pled guilty to two counts of possession of a firearm for an unlawful purpose. Under New Jersey law, that crime carried a penalty of 5 and 10 years' imprisonment. Id. at 2352. A separate New Jersey statute allowed the court to sentence a defendant to up to 20 years' imprisonment if the defendant acted with racial bias in committing the crime. Id. Finding by a preponderance of the evidence that Apprendi acted with racial bias, the court sentenced him to 12 years' imprisonment.

The Supreme Court ruled this New Jersey sentencing scheme unconstitutional because it violated due process and the right to trial by jury. Id. In so doing, the Court severely limited both McMillan and Almendarez-Torres: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 2362-63. Therefore, a jury had to find beyond a reasonable doubt that the defendant acted with racial bias in order to enhance his sentence on that basis. Id. at 2363.

The issue in this case is how Apprendi affects the

federal sentencing scheme for drug offenses. Mr. Beharry was convicted of possession and importation of cocaine in violation of 21 U.S.C. §§ 841 and 952. (R-549). Although the statutory provisions for possession are all contained in § 841, whereas they are split into two statutes for importation, 21 U.S.C. §§952 & 960, the sentencing provisions are virtually identical. Indeed, they share the same provision of the Sentencing Guidelines. U.S.S.G. §2D1.1.

Subsection 841(a), entitled "Unlawful Acts," provides generally that it is unlawful to knowingly possess a controlled substance with intent to distribute. Subsection 841(b), entitled "Penalties," provides for different penalty ranges depending on the type and quantity of drugs involved. Under §841(b)(1)(A)(ii), a conviction for possession of 5 or more kilograms of cocaine carries a sentence of not less than 10 years' imprisonment and not more than life.

Similarly, §952 makes it unlawful to import a controlled substance into the United States. Then §960(a), entitled "Unlawful acts," states that any person who "knowingly or intentionally" imports controlled substances into the United States as stated in §952 shall be punished as set forth in subsection (b), the "Penalties" section. Subsection 960(b) is structured almost identically to §841(b). As in §841(b), under §960(b)(1)(B) a conviction for importation of more than 5 kilograms of cocaine carries a sentence of imprisonment for "not less than 10 years and not more than life." Both §841 and §960 provide lesser penalties for lower quantities of cocaine. Subsection

841(b)(1)(C) and §960(b)(3) also provide for imprisonment of "not more than 20 years" for possession of a controlled substance not covered by the other portions of those statutes.

Given such a broad sentencing range of 10 years to life, the Sentencing Guidelines are what primarily determine the defendant's sentence. The Drug Quantity Table in U.S.S.G. §2D1.1(c), which applies to both §841 and §§952 and 960, provides different base offense levels for different quantities of cocaine. The difference in the base offense level can be as great as less than a year imprisonment for less than 25 grams of cocaine (level 12), to 293 months imprisonment for over 150 kilograms of cocaine (level 38). U.S.S.G. §2D1.1(c).

Despite the fact that drug quantity is the single most important factor in determining a defendant's sentence under the federal drug laws, until now the courts have uniformly held that the judge, not the jury determines drug quantity, and that drug quantity need only be proven by a preponderance of the evidence. See, e.g. United States v. Williams, 876 F.2d 1521 (11th Cir. 1990). These courts have generally reasoned that placing references to drug quantity in the subsection entitled "penalties" indicates that drug quantity is a sentencing factor, rather than an element. See id. at 1525. Courts have interpreted §960 the same way. United States v. Jinadu, 98 F.3d 239, 248-29 (6th Cir. 1996). With Apprendi, the Supreme Court has signaled that this must change.

Although Apprendi involved a hate crimes

statute, the Supreme Court has already indicated that Apprendi also applies to §841. In Jones v. United States, 120 S.Ct. 2739 (2000)(Jones II), the Court vacated a conviction under §841, and remanded to the Tenth Circuit for reconsideration in light of Apprendi.

In Jones II, the Tenth Circuit had considered whether the Supreme Court's opinion in a different Jones v. United States, 526 U.S. 227 (1999)(Jones I), which foreshadowed Apprendi, made the quantity provisions of §841(b)(1) elements of the crime instead of "sentencing factors." 194 F.2d 1178 (10th Cir. 1999). In Jones I, the Supreme Court ruled that the provisions for increased penalties in the federal car jacking statute, 18 U.S.C. §2119, where the offense involves serious bodily injury of death, were elements of the offense rather than sentencing factors. The Court stated in dicta that "under the Due Process Clause of the Fifth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones I, 526 U.S. at 243 n.6.

The Tenth Circuit in Jones II noted that Jones I "opens the door to the question of whether §841's unambiguous classification of quantity as a sentencing factor violates the Fifth and Sixth Amendments." 194 F.3d at 1186. Nonetheless, the Tenth Circuit adhered to its prior precedent and ruled that provisions of §841 for enhanced penalties depending on drug quantity were sentencing factors, not elements of the offense. Id. This Circuit is in accord. See United States v. Hester,

199 F.3d 1287, 1291-92 (11th Cir. 2000).

However, with the Supreme Court's vacating of the Tenth Circuit's decision in Jones II, there can be no serious question of whether Apprendi applies with equal force to §841 and the materially indistinguishable provisions of §§952 and 960. Although the Eight Circuit has rejected application of Apprendi to §841, it failed to recognize the Supreme Court's more recent decision in Jones II, which came out only a few weeks before. See United States v. Aguayo-Delgado, 2000 WL 988128 (8th Cir. 2000); United States v. Sheppard, 2000 WL 988127 (8th Cir. 2000).

Indeed, the rationale and sweeping language of Apprendi apply with equal force to the federal narcotics laws such as §§841, 952 and 960. In a very recent decision applying Apprendi to §841, a West Virginia district court noted that the rationale used in Jones I simply cannot survive Apprendi:

> Apprendi rejects attaching any significance to the separation of the "Penalties" in section 841(b) from the "Unlawful Acts" in section 841(a), which courts relied on heavily in holding that a drug amount is a sentencing factor. In light of Apprendi, this separation is nothing more than an artificial formalism.

United States v. Henderson, 2000 WL 1006054, *13 (S.D.W.Va. 2000)(citation omitted). Under the rationale of Apprendi, "Congress cannot curtail due process and Sixth Amendment rights by simply placing artificial labels on statutory aggravating facts." Id. at *15. Indeed, the Court's opinion in Apprendi is clear on this point: "[T]he relevant inquiry is one not of form, but of effect--does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" 120 S.Ct. at 2365.

The Eighth Circuit focused on the fact that Apprendi specifically addressed only a situation where the additional facts raised the defendant's sentence above the **statutory** maximum and did not address the federal Sentencing Guidelines. See Aguayo-Delgado, 2000 WL 988128 at *5; see also Apprendi, 120 S.Ct. at 2366 (noting that the federal Sentencing Guidelines were not before the Court at that time). Under the federal sentencing scheme for drug offenses, §§841 and 960 place the statutory maximum penalties at life for most drug quantities, and leave it up to the Sentencing Guidelines to parcel out sentencing ranges within that limit.

However, although the Sentencing Guidelines divide the offense into more sentencing categories based on drug quantity than the statutes, the statutes themselves also rely on drug quantity to determine sentencing limits. Not all drug quantities carry a statutory maximum sentence of life in prison. See 21 U.S.C. §841(b)(1)(B)(40 years for 500 grams or more of cocaine); id. §960(b)(2)(Same); id. §841(b)(1)(C)(20

years for any offense not covered by the other provisions--which would include less than 500 grams of cocaine); id. §960(b)(3)(same). Moreover, each of these different statutory categories carries a different felony grade. See 18 U.S.C. §3559 (defining felony grades); Henderson, 2000 WL 1006054 at *11.

This statutory scheme is similar to the firearms statute, 18 U.S.C. §924(c), recently construed by the Supreme Court in United States v. Castillo, 120 S.Ct. 2090 (2000). That statute provided for different penalties for using a firearm during a crime of violence depending on the type of firearm. Id. at 2091-92. The title of §924 is "Penalties," and the categories are introduced with the phrase "shall . . . be sentenced to," which separates it from the rest of the section. Nonetheless, the Supreme Court construed the language of that statute to mean that the type of firearm was an element of the offense that had to be determined by the jury beyond a reasonable doubt. Id. at 2092. Because of that interpretation, the Court did not need to reach the constitutional question. See id.

Similarly, §841(b) and §960(b) provide different penalties depending on the type and amount of drugs involved. As in Castillo, this Court should interpret these provisions to provide elements, not sentencing factors, and thereby avoid the necessity of invalidating the statutes on constitutional grounds.

Second, the reasoning underlying Apprendi is that "'it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal

defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" 120 S.Ct. at 2363 (citation omitted).

Drug quantity is a factor that increases the penalty greatly under both the statutes and the Sentencing Guidelines. Indeed, it is the most significant factor in sentencing. Moreover, within the broad statutory range of 10 years to life, the Guidelines can more than double the penalty depending on drug quantity. As the Court noted in Apprendi:

> [I]t can hardly be said that the potential doubling of one's sentence--from 10 years to 20--has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance.

Id. at 2363.

In her dissent, Justice O'Connor recognized that this reasoning would apply equally to sentencing schemes like the federal Sentencing Guidelines:

> The actual principle underlying the court's decision may be that any fact (other than prior conviction) that has the

> effect, *in real terms*, of increasing the maximum punishment beyond a otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt. The principle thus would apply not only to schemes like New Jersey's, under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (*e.g.*, the federal Sentencing Guidelines).

Id. at 2391 (O'Connor, J., dissenting). The Court's later decision in Jones II, remanding for reconsideration in light of Apprendi, appears to validate her reading of Apprendi. The majority's adamant refusal to address the effect of its decision on the federal Sentencing Guidelines, see id. at 2366 n.21, thus appears to reflect a desire to address only the case at bar, and is not a sign

that the majority would not apply the same rationale to the federal sentencing scheme.

Furthermore, as Justice Thomas points out in his concurring opinion, the federal Sentencing Guidelines "'have the force and effect of laws.'". 120 S.Ct. at 2380 n.11 (Thomas, J., concurring)(citation omitted). They are approved by Congress--as are statutes, although the procedure is different. See 28 U.S.C. §994(p)-(r).

It would undercut the entire rationale of Apprendi if the determination of what facts are elements of the crime depended on whether Congress placed that fact in the statute or in the Sentencing Guidelines. Under Apprendi, it is the **real effect** of the fact that matters, not a legislature's label--whether that label is "penalties" or "sentencing guidelines." Allowing criteria that substantially increase the penalty for an offense to be determined by a judge under a lesser standard simply because it is in the "guidelines" and not the "statute," would be as meaninglessly formalistic as the sentencing schemes rejected by the Supreme Court in Castillo and Apprendi. "When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a tail which wags the dog of the substantive offense.'" 120 S.Ct. at 2365 (quoting McMillan, 477 U.S. At 88). Therefore, the determination of drug quantity under 21 U.S.C. §952 and §§ 841 and 960 and the federal Sentencing Guidelines must be made by a jury and proven beyond a reasonable doubt. To the extent the

federal sentencing scheme provides that the judge makes the determination by a preponderance of the evidence it violates the Fifth and Sixth Amendments.[7]

In this case, the indictment did not allege, and the jury did not find, any drug quantity. Indeed, this case is a good example of why the jury, not the judge, should determine drug quantity. Not only did the district court determine drug quantity, but the court attributed to Mr. Beharry large quantities of drugs beyond those of the two events for which he was convicted. Some of those additional drugs were alleged to be part of the broader conspiracy on which the jury could not reach a verdict, and some were from alleged importations outside the time period of the conspiracy. In so doing, the court relied on the same testimony that failed to convince the jury to find Mr. Beharry guilty of conspiracy beyond a reasonable doubt. Without a jury determination, there is simply no basis for the court to determine which statutory category, let alone Sentencing Guidelines category, to apply.

Mr. Beharry's indictment, conviction and sentence are in violation of his Fifth and Sixth Amendment rights. This Court should reverse and remand for a new trial in which all of the elements are decided by the jury by proof beyond a reasonable

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[7]As they also increase the penalty significantly, the sentencing enhancements for possession of a firearm and role in the offense should also e considered elements and should have been determined by the jury here.

doubt.[8]

II. THE DISTRICT COURT ERRED BY GIVING AN ALLEN CHARGE WHEN ONE JUROR HAD EXPRESSED FEAR FOR HER SAFETY IN THE JURY ROOM.

On Friday, after several days of deliberations, the trial court received a note that Juror 8 did not feel safe in the jury room and requested the presence of the bailiff. Speaking to the judge outside the presence of the other jurors, this juror expressed concern for her physical safety because of the level of hostility in the jury room. Nonetheless, the district court, over defense objection, gave a modified Allen charge. Under the circumstances, that charge was unduly coercive. This case must be reversed and remanded for a new trial.

Giving an Allen charge is error when it has the effect of coercing the jury. See United States v. Elkins, 885 F.2d 775, 783 (11th Cir. 1989). Although this Court has approved use of a modified Allen charge in most circumstances, this case presents perhaps the best example of when giving of that charge will have an unduly coercive impact on the jury--where the

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[8]At a minimum, this Court should reverse and remand for resentencing to not more than 20 years under §841(b)(1)(C) and §960(b)(3). See Henderson, 2000 WL 1006054.

dissenting juror has made the court aware that she fears for her physical safety in the jury room.

First, it is well-recognized that the impact of an Allen charge is more coercive when the court is aware of the nature and extent of the jury's division. When the court is aware of the identity of the dissenting jurors, those jurors would naturally perceive an Allen charge as focused directly at them. See United States v. Sae-Chua, 725 F.2d 530 (9th Cir. 1984). For this reason, polling the jurors to determine how the jury stands is per se error. See United States v. Spitz, 696 F.2d 916 (11th Cir. 1983)(quoting Brasfield v. United States, 272 U.S. 448 (1926)). However, under some circumstances, the mere disclosure to the judge of the jury's numerical division before giving an Allen charge has been found coercive. Sae-Chua, 725 F.2d at 532; Williams v. United States, 338 F.2d 530, 532-33 (D.C.Cir. 1964).

For example, in Sae-Chua, the judge knew the numerical breakdown of the jury and the identity of the dissenter. 725 F.2d at 532. More importantly, "[t]he dissenting juror was aware of the fact that the judge possessed this knowledge." Id. The judge nonetheless gave a modified Allen charge over objection. The court reversed and remanded for a new trial:

> Under these circumstances the charge could only be read by the dissenting juror as being leveled at him. He could hardly escape reasoning that the judge was

> not likely to believe that he could persuade the opposing eleven to adopt his position . . . and that he, individually, was being urged by the judge to reconsider his vote. We hold that the giving of the charge under these circumstances was coercive and constituted reversible error.

Id.

In this case, although the judge did not poll the jury before giving the Allen charge, the effect was the same because the judge knew the identity of the dissenting juror. Moreover, as in Sae-Chua, that juror knew the judge had that knowledge. She would naturally feel that the judge's comments were directed specifically at her. Added to this, however, is the fact that the judge gave the charge even though the dissenting juror had told the judge that she feared for her physical safety in the jury room.

Jury deliberations in this case began on Wednesday. On that Friday, the district court received several notes from the jury. One stated that "we have considered only one count and we are stuck." (R-585-2810). The second note stated that that Juror 8 "does not feel safe in the jury room" and needed the bailiff. (R-585-2810).

The judge spoke to Juror 8, Carol Best, out of

the presence of the other jurors. (R-585-2832). She was very upset and crying. See (R-585-2833, 2836). Being careful not to intrude upon the discussions and thought process of the jury, the judge questioned Ms. Best about the basis for her fear. She expressed concern for her physical safety:

> THE COURT: Now I want to ask you, do you feel or do you have a concern for your physical safety?
>
> **MS. BEST: At certain moments in there, yes.**
>
> THE COURT: Are we taking about the level of the discussion, or the civility in the discussion?
>
> MS. BEST: Civility in the discussion.
>
> THE COURT: Civility?
>
> MS. BEST: Yes, sir.
>
> THE COURT: Is there anything else with regard to your safety that you wanted to mention to me?
>
> MS. BEST: Well, in the jury room when people are expressing opinions--
>
> * * *

MS. BEST: When I am being spoken to regarding statements that I have made which may be contrary to what other jurors feel, the voice is raised to a very high level. The comments are directed exactly to me, I am commended, even if I am looking at a piece of paper, to stop and look directly at whoever.

THE COURT: Okay. I want to stop there. I hear what you are saying, and so it is a question, really, of the tone and just the issues of civility in the room, do you feel? Is that a general description?

MS. BEST: That is **part** of it, yes.

THE COURT: Is there anything else that I need to be aware of?

MS. BEST: Well, I haven't been struck.

THE COURT: But are you in fear that could happen?

MS. BEST: I think the conversations, tones, and level of the voice, I am not a young woman and I have been around a long time, I have no fear, I live alone. I go in my back yard with a baseball bat when I hear a noise, and so I am not -- and I very rarely cry, **but I think that that could move to something more physical,** foul

language has been used. I don't want off the jury.

(R-585-2834-36).

The judge decided to adjourn until Monday, hoping the weekend would cool things down. See (R-585-2838). Before releasing them for the weekend, the judge cautioned them to remain civil to each other during deliberations. (R-585-2840).

The jury continued deliberations on Monday. (R-586) The court then received a note that said "we are unanimous on Count 5, we are hung on counts 2, 3, 4, 6, and feel we cannot make any further progress, this is unanimous." (R-586-2846). Over defense objection that it would be unduly coercive and single out Juror 8, the judge gave the jury a modified Allen charge. (R-586-2856-57). The district court denied the defense motion for mistrial. (R-586-2867). The jury returned a verdict later that same day finding Mr. Beharry guilty on Counts 2, 3, 5, and 6, and hung on the others. (R-586-2871; R-514).

The circumstances clearly indicated that Juror Best was disagreeing with the rest of the jurors and that her refusal to go with the pack was making the others hostile. Indeed, the hostility was so great that Juror Best felt compelled to notify the court and request the presence of the bailiff. This tough, independent lady was visibly upset and crying, even though she stated that she rarely cried.

Although the judge chose to characterize her concerns as being about "civility," Ms. Best made it clear that was only "part" of it. She expressly, and

repeatedly, stated that she had concerns for her physical safety. Given the level of hostility, she felt that the deliberations could turn violent. Yet despite these clear statements about her fear, the district court inexplicably stated that "the issue is not one of physical safety" in justifying giving the charge on Monday. (R-586-2851). After giving that charge, the jury which had struggled for days to reach a verdict on one count returned a verdict on three more counts in a matter of hours. The impact of this charge is clear.

As Judge Edmondson noted in United States v. Rey, 811 F.2d 1453 (11th Cir. 1987), an Allen charge is by its nature coercive and intimidating.

> The last thing such a minority holdout juror needs is for the trial judge--cloaked with the full authority of his office--to even hint that holding out will be futile in the long run and that a verdict could be reached if the holdout would just reconsider.

811 F.2d at 1460. Where the judge knew the identity of the dissenting juror and that juror had expressed to the court her concerns about her physical safety, the effect--and incentive to give in--is even greater. In that context, holding out would not only be futile, but potentially dangerous.

Under these circumstances, giving an Allen charge was inherently and unduly coercive. This case

must be reversed and remanded for a new trial.

III. THE GOVERNMENT ENGAGED IN A PATTERN OF MISCONDUCT THAT SUBSTANTIALLY PREJUDICED MR. BEHARRY.

A very disturbing aspect of this case is the pattern of governmental misconduct at all stages of this prosecution. Government agents lied under oath to obtain Mr. Beharry's indictment and extradition and paid government witness Wade Lalla to secure the indictment. The government also failed to disclose a statement allegedly made by Mr. Beharry to a Trinidadian police officer, misled the district court about when the prosecution had learned of that statement, and lost the passport requested to impeach another significant government witness. This misconduct substantially prejudiced Mr. Beharry. The district court denied Mr. Beharry's motions for mistrial, to dismiss, and for a new trial. Mr. Beharry's conviction should be vacated, his indictment dismissed, and he should be repatriated to Trinidad. At a minimum, this requires a new trial.

A. Government agents lied to obtain Mr. Beharry's indictment and extradition from Trinidad and Tobago.

The government knowingly used false testimony to procure the indictment and then to convince the Trinidadian government to extradite Mr. Beharry. DEA

Agent Duffy's testimony before the grand jury and in the separate trial of co-defendant Ronald Rampresad, and the affidavits of DEA Agents Duffy and Mancini, and AUSA Boma, all of which were included with the extradition request to Trinidad, contained the same false statement--that an unidentified, unknown male co-conspirator who was a fugitive and who was being sought for arrest was with Wade Lalla during the February 2nd and February 10th, 1994 importations. See (R-533). This statement conveyed the idea that there was an unknown fugitive co-conspirator involved with Mr. Beharry, and inferred that Mr. Beharry was involved in hiding this person and continuing to deal narcotics with this co-conspirator.

However, during defense cross-examination at trial, Agent Duffy disclosed for the first time that the person with Wade Lalla during these importations was neither unidentified, unknown, or a fugitive, nor was he being sought for arrest. (R-578-1820-56). Instead, he was Carlos Manickchand, a confidential source known to and working undercover with the government. (R-578-1820-21). This man's identity was known from the start to the DEA agents and AUSA Boma. (R-578-1828, 1836-37).

The government never disclosed the identity of this man to the defense before trial. Even after the government disclosed that there was a confidential informant involved, the government never indicated that the confidential informant was the alleged fugitive co-conspirator with Lalla in February 1994 as discussed in the affidavits, even though that fact was known by

both the DEA agents and AUSA Boma. See (R-529; R-578-1819).

The affidavits also misleadingly stated that the man was later identified by Wade Lalla as "Carlos Manaracha." (R-533-Exh.E-H). However, when Lalla was recalled to the stand at trial, he testified that he had know Carlos for some time before 1994, that he knew his correct name was "Manickchand," and that he never told the government otherwise. (R-581-2369).

Agent Duffy's testimony at trial shows how deliberate the lie was. He claimed his statements had been technical correct because they referred to the fictitious Carlos Manaracha, not Carlos Manickchand -- even though he knew that Carlos Manickchand was actually the person with Lalla and there was no such person as Carlos Manaracha. (R-578-1830-31). Indeed, he stated that if he had not been otherwise instructed by the court, he would have continued to testify that the person with Wade Lalla was Carlos Manaracha -- simply because of DEA policy. (R-578-1831-32). After all, he had already given such testimony in the separate trial of alleged co-conspirator Rampresad. See (R-533-Exh.E). Significantly, unlike Duffy, AUSA Reinhart recognized that without the court's order Duffy would not be answering "truthfully." (R-578-1818).

Carlos Manickchand was not a co-conspirator or a fugitive--he was working for Agents Duffy and Mancini all along. (R-578-1830). This was a deliberate and calculated lie, chosen to make it seem as though there was another individual working with Mr. Beharry

who managed to get away.

These actions not only violated Mr. Beharry's due process rights, but also violated the extradition treaty between Trinidad and the United States. These deliberate misrepresentations permeated Mr. Beharry's indictment and extradition and rendered the district court's jurisdiction over Mr. Beharry invalid.

1. Lies to the grand jury. The government first used the known false testimony of Agents Duffy and Mancini and AUSA Boma to obtain the indictment against Mr. Beharry. AUSA Boma, knowing the truth about Carlos, asked Agent Duffy about the "fugitive" who got away. (R-578-1840-43). Agent Duffy explained that "the fugitive"--the man who was with Wade Lalla during the two importations in February 1994--got away because the agents were "spread too thin" during the arrests and there were insufficient officers working to go after "the fugitive" who drove off. (R-578-1840-43). Of course, AUSA Boma and Agent Duffy knew this was false -- no agent ever intended to go after the "fugitive." See (R-578-1836-37). Carlos Manickchand got away because he was working undercover with the DEA, not because the agents were spread out too thin. Agent Duffy also told the grand jury that Lalla identified the man as Carlos Manaracha. See (R-578-1841-42)(misspelled "Maharej"). That too was false. See (R-581-2369).

The knowing use of material false evidence by the government in criminal prosecutions violates due process. See Giglio v. United States, 405 U.S. 150 (1972). "'The same result obtains when the

[government], although not soliciting false evidence, allows it to go uncorrected when it appears.'" Id. (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)).

"Federal courts possess the power and duty to dismiss federal indictments obtained in violation of the Constitution or laws of the United States." United States v. Pabian, 704 F.2d 1533, 1536 (11th Cir. 1983); see also Giglio, 405 U.S. 150 (federal courts have supervisory power over grand jury investigations). Although an extreme sanction, "[i]t is well settled that district courts may exercise their discretionary power to dismiss an indictment on grounds of prosecutorial misconduct where a sufficient showing of prejudice has been made." United States v. Accetturo, 858 F.2d 679 (11th Cir. 1988).

Significantly, the government's misconduct in this case was intentional, not negligent. Contrast United States v. Exharos, 135 F.3d 723 (11th Cir. 1998)(when government learned about falsified documents the prosecution refused to use them at trial). The knowing use of false testimony not only by government agents, but by the prosecutor, sets this case apart from others involving prosecutorial misconduct before the grand jury.

In United States v. Sterba, 22 F.Supp.2d 1333 (M.D.Fla. 1998), the government disclosed the existence of a confidential informant pursuant to the court's pretrial order, but refused to permit that informant to be interviewed or even to disclose the informant's name prior to trial. At trial, the government called this informant to the stand. She testified that her

name was "Gracie Greggs." A witness of that name was also listed on the government's witness list. The witness also testified that she was the confidential informant. Id. at 1338.

The defense investigated the witness during trial, based on the understanding that the witness' name was "Gracie Greggs" and found nothing. In fact, the witness' name was "Adria Jackson." Id. at 1334. That information was not discovered by defense counsel until after the government rested. Id. at 1336-37.

Once the defense could investigate Adria Jackson, a number of potentially significant facts came to light that could have seriously impeached her credibility. For example, she was paid money as part of this investigation, had pled guilty to making a false statement and filing a false police report, and had a reputation in her community as a liar. Government counsel admitted that they knew the witness would testify to a false name, but argued that she answered all other questions truthfully.

The district court granted the defense motion for mistrial and dismissed the indictment. The district court was very concerned with

> why an AUSA should decide what degree of truthfulness in testimony is deserved by the court, how an AUSA can forgive the falsification of testimony of developing a competing consideration, and how an

> agency not entitled to do so can introduce sub silentio a false name into a court proceeding without judicial knowledge or consent (assuming its availability).

Id. at 1338. All in the name of obtaining a conviction, the government "either manufactured or accepted a plan" to lie to the defense and the court to avoid any "bothersome" problems with the witness' credibility. Id. at 1340. "In short, the AUSA arrogated to herself the legal and moral authority to decide what truth became public and, thereby, what fate awaited" the defendant. Id.

In discussing the prejudice to the defendant, the court noted that the government's lie forced the defense to plan and disclose their trial strategy and evidence, while the government withheld significant information. Id. at 1342. Once the defense discovered the lie during trial, the government's actions forced the defense to move for a mistrial. Therefore, the district court ruled that not only was a mistrial necessary, but the indictment must be dismissed. Id. at 1341-43 (citing United States v. Torkington, 874 F.2d 1441 (11th Cir. 1989)(double jeopardy prohibited retrial after mistrial where prosecution's actions compelled the defendant to move for a mistrial).

In this case, the government was willing to lie to the grand jury, to the defense, and to the courts here and in Trinidad in pursuit of a conviction. The government was also willing to deceive Mr. Beharry's jury, and it

was not until Agent Duffy was cross-examined by the defense that the truth emerged. As in Sterba, the lie involved the true identity of a confidential informant.

The prejudice in this case is even greater than in Sterba because the government never called the informant to testify before the grand jury or at trial. Thus, instead of the grand jurors wondering why the government had not called its own confidential informant to testify, the grand jury was mislead into believing that the person with Lalla during the February 1994 importations was actually a co-conspirator who was not called to testify because he was a fugitive from justice. This, we now know, is not true.

Moreover, the defense was unable to investigate Carlos Manickchand or call him at trial because it was not until mid-trial that it was discovered that Manickchand was the "fugitive co-conspirator" with Lalla on February 2 and February 10, 1994. Carlos Manickchand was outside the subpoena power of the United States. Thus, the defense never had an opportunity to investigate or examine this witness who apparently was in the middle of the alleged importations for which Mr. Beharry was convicted.[9]

2. Extradition. Mr. Beharry's extradition was invalid because the government's conduct violated the extradition treaty between Trinidad and the United

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[9]The district court denied the defense request for a missing witness instruction, compounding the problem. See (R-581-2445-47).

States. "As a matter of international law . . . nations are under no legal obligation to surrender a fugitive from justice in the absence of a treaty." United States v. Puentes, 50 F.3d 1567, 1572 (11th Cir. 1995). Thus, the terms of an extradition treaty govern the procedure and validity of an extradition. See also 18 U.S.C. § 3184.

The 1931 extradition treaty between the United States and Great Britain is applicable to Trinidad, a former British possession. See Hoi-Pong v. Noriega, 677 F.Supp. 1153 (S.D.Fla. 1988). Under this treaty, the United States had to provide "sufficient evidence" that the person sought to be extradited committed the alleged offense to obtain extradition. See Extradition Treaty Between U.S. & Great Britain of 1931, arts. 9, 11, 47 Stat. 2122.

Here, the affidavits of Agents Duffy and Mancini, and AUSA Boma, accompanied the extradition request as evidence for the court in Trinidad. See (R-533). Agent Duffy's affidavit stated that with Lalla was "Wayne LNU [last name unknown], subsequently identified as Carlos Manaracha, who remains an unindicted fugitive in this case." (R-533-Exh.G; R-578-1826); see also (R-578-1841-42). We now know, however, that these affiants intentionally lied in their statements. Indeed, Agent Duffy and AUSA Boma knew that Carlos Manickchand was with Lalla in February 1994 and that AUSA Boma knew this **before** the affidavits were submitted to Trinidad as an official U.S. request for Mr. Beharry's extradition. (R-578-1836-37). The court in Trinidad did not know this, and

thus could not accurately gauge their credibility.

The extradition process in Mr. Beharry's case was not simply a rubber-stamping of the United States' request for extradition. Mr. Beharry was indicted on ten counts, but the court in Trinidad refused to extradite on counts nine and ten, finding insufficient credible evidence to support extradition on those counts. (R-572, 277; R.E. 3). The court weighed the evidence presented during the extradition proceedings and determined whether it was credible and sufficient. Certainly, it would have been highly probative, material, and weighty for the Trinidadian court to know that Agent Duffy, Agent Mancini, and AUSA Boma -- the three American law enforcement officers representing the United States in these proceedings--all lied under oath in their affidavits. Knowing this, the court could have then determined how much weight, if any, to give to their affidavits.

"Deliberate deception of a court . . . by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" Giglio, 405 U.S. at 153. Requests for extradition must comport with fundamental tenets of international jurisprudence, principles of treaty construction, and nuances of foreign law. Knowingly filing a false affidavit is not only unethical and criminal, but also incompatible with established principles of international law. Every country that enters into an extradition treaty with the United States expects that affidavits submitted in support of an extradition request do not contain knowing, deliberate falsehoods such as the ones

contained in the affidavits in this case.

3. Appropriate Relief. Because of the government's intentional and illegal conduct, Mr. Beharry's indictment is hopelessly compromised. As in Sterba, a new trial or simple exclusion of some evidence will not adequately cure the prejudice to Mr. Beharry. Dismissal of the indictment is the only remedy that can both address the prejudice to Mr. Beharry and send the appropriate message that intentional lies will not be tolerated.

Furthermore, the appropriate remedy for violation of the extradition treaty in this case that will prevent the recurrence of such conduct is repatriation. See Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993)(vacating judgment extraditing defendant to Israel because of federal prosecutors' fraud on the court); United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991) (repatriation appropriate remedy for violation of extradition treaty), vacated on other grounds, 505 U.S. 1201 (1992). Such relief would signify this Court's unwillingness to countenance deliberate deceit by its court officers in foreign courts. At the least, this conduct warrants a new trial so the defense can have an opportunity to investigate Carlos Manickchand.

B. The government purchased the indictment of Mr. Beharry by paying a government witness a reward for securing the indictment.

Mr. Beharry's indictment should also be dismissed and the extradition declared invalid because, according to the government's own voucher, Wade

Lalla was paid $5,000 for "securing the indictment" in this case. See (R-534; R-577-1607; R.E. 8). This cash reward for securing Mr. Beharry's indictment violates the federal anti-bribery statute, 18 U.S.C. § 201(c)(2) and due process.

The government's payment of a $5,000 cash reward to its main cooperating witness sets this case apart from other cases dealing with illegal procurement of the testimony of government witness. In United States v. Lowery, 166 F.3d 1119, 1124 (11th Cir. 1999), this Court held "that agreements in which the government trades sentencing recommendations or other official action or consideration for cooperation, including testimony, do not violate 18 U.S.C. §201(c)(2)." This Court reasoned that such agreements could not come within the plain meaning of the bribery statute, or courts and defense counsel would have raised the issue regularly during the thirty years the statute has been in effect. See id.

Significantly, this Court did not base its reasoning on an interpretation that would totally exclude federal prosecutors from the provisions of the statute, despite the fact that this was the basis for the Tenth Circuit's decision reaching the same result in United States v. Singleton, 165 F.3d 1297 (10th Cir. 1999)(en banc reversing contrary panel opinion). Implicitly, therefore, this Court has concluded that there may be some circumstances in which the actions of government prosecutors may run afoul of 18 U.S.C. §201(c)(2).

This conclusion comports with the plain

language of the statute. 18 U.S.C. § 201(c)(2) provides that "whoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of [his or her] testimony under oath" has committed bribery. "Whoever" is an extremely broad term that naturally includes government prosecutors. See 1 U.S.C. § 1 (defining "whoever" to include "individuals"); United States v. Condon, 170 F.3d 687, 689 (7th Cir. 1999)(under 1 U.S.C. § 1, "whoever" is defined to encompass federal prosecutors).

Moreover, in Nardone v. United States, 302 U.S. 379 (1937), the Supreme Court addressed whether a statute that allowed "no person" to tap phones applied to government agents. The Court ruled that the government has been excluded from coverage in such an act in only two circumstances: (1) "where an act, if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest," or (2) "where a reading which would include such officers would work an obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm." Id. at 383-84. Neither circumstance applies here.

First, unlike the long-established practice of offering leniency in exchange for testimony or other assistance, there is no "recognized or established" practice of the government offering substantial amounts of reward money in return for securing an indictment. Courts have approved paying a cooperating government witness to cover expenses and as part of participation in

the federal witness protection program. However, several circuits have recognized that the payment of money expressly for testimony, or as a "reward" for assistance in obtaining an indictment or conviction is a very different matter. See United States v. Hunte, 193 F.3d 173, 176 n.4 (3d Cir. 1999)(reserving question of §201(c)(2)'s application where witness has received money from government in exchange for testimony); Condon, 170 F.3d at 689-90 (rejecting argument that leniency in exchange for testimony violates §201(c) but declining to hold that statute does not apply to federal prosecutors because that could allow prosecutors to purchase favorable testimony). But see United States v. Albanese, 195 F.3d 389 (8th Cir. 1999).

Unlike leniency or expense money, there is no long-established statutory or historical basis for allowing prosecutors to pay cash rewards for securing an indictment. See Condon, 170 F.3d at 689. Nor is application of this statute to government lawyers in such circumstances absurd. Just the opposite. Surely, such payments have the same potential to corrupt testimony when offered by government prosecutors as when offered by defense counsel. See Albanese, 195 F.3d at 398 (Heaney, J., dissenting) ("I find no reason to believe that testimony bought and paid for by the government is somehow immune from being corrupted, either by design or otherwise").

Not only did the government violate the federal bribery statute, but it also violated Mr. Beharry's due process rights. In order to comport with due process, fee agreements with cooperating government witnesses

may be contingent on a successful investigation, but **may not** be contingent on the successful prosecution of a particular individual. See United States v. Sanchez, 790 F.2d 1561 (11th Cir. 1986).

Lalla was paid a substantial amount of money for "securing the indictment" of Mr. Beharry. To be sure, Lalla received the benefit of his cooperation when his sentence was substantially reduced to approximately 2 ½ years. See (R-577-1539). Following his sentence reduction, Lalla was admitted into the Witness Protection Program, where he was given money by the U.S. Marshal Service for moving expenses, housing, food, clothes, a car, medicine, and all other his other financial needs. (R-577-1539, 1610, 1663-64). However, the DEA also gave Lalla $5,000, not so that Lalla could buy clothes or eat, but as a reward for "securing" Mr. Beharry's indictment. See (R-577-1607).

In essence, the government purchased Wade Lalla's testimony, not only by offering him leniency and a chance to start over in the witness protection program, but with a significant cash reward over and above Lalla's expenses. This is precisely what the federal bribery statute was designed to avoid.

The district court erred in denying the defense motions without even an evidentiary hearing. See (R-538).[10] This Court should vacate Mr. Beharry's

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[10]Although the district court at first indicated it would hold an evidentiary hearing on this serious matter, (R-2349), no hearing was held.

conviction and remand with instructions to dismiss the indictment. In the alternative, Mr. Beharry should be given a new trial--without the purchased testimony of Wade Lalla.

C. The district court erred in admitting the testimony of Officer McAlpin regarding undisclosed statements of Mr. Beharry.

The government called Trinidadian Officer McAlpin to testify about a statement he allegedly overheard Mr. Beharry make in 1992. (R-575-1195). According to McAlpin, Mr. Beharry was pulled over by traffic officers in 1992, at which time McAlpin overheard Mr. Beharry state that there was no reason for the officers to harass him because he was sending his narcotics to the United States. (R-575-1209). McAlpin's testimony on this statement corroborated the testimony of cooperating government witness Marlon Hall, who previously had testified that he was with Mr. Beharry when Mr. Beharry was pulled over in 1992 and that he heard Mr. Beharry make the same statement. (R-573-589-90).

The defense moved to exclude McAlpin's testimony pursuant to Federal Rule of Criminal Procedure 16, because the government failed to disclose it prior to trial. (R-575-1199). Although Officer McAlpin was on the government's witness list, the government indicated that he was going to testify about a different matter. See (R-575-1200-02). The

government responded that it did not become aware of Mr. Beharry's 1992 statement until right before Hall testified. (R-575-1200-02).

The district court found that there had been a discovery violation because Mr. Beharry's 1992 alleged statement fell within Rule 16. (R-575-1207; R.E. 6). However, the district court ruled that suppression of McAlpin's testimony was too harsh a sanction in comparison with Mr. Beharry's prejudice resulting from the violation. (R-575-1207-08). The defense motion for mistrial was also denied. (R-580-2353-56). Thus, the defendant was left with no remedy.

On cross-examination, McAlpin testified that he told the government about the 1992 statement **before the trial started**. (R-576-1238-39). On re-direct, the government did not correct McAlpin's testimony, even though it directly conflicted with the prosecutor's representation that the government did not learn about the 1992 statement until the day Hall testified. See (R-576-1271-80).

The district court correctly ruled that the government violated Rule 16 by failing to disclose this alleged 1992 statement. The question then became what sanction was appropriate. In considering the appropriate sanction, the court should consider "(1) the reasons for the delay in complying with the discovery order; (2) whether the government acted in bad faith; (3) whether the defendant was prejudiced; and (4) the availability of alternate means to cure the prejudice." United States v. Christopher, 923 F.2d 1545, 1555 (11th Cir. 1991). A new trial is warranted where is a

violation of the defendant's substantial rights. United States v. Camargo-Vergara, 57 F.3d 993 (11th Cir. 1995).

Here, we have no idea why the government failed to comply with Rule 16. The government represented to the district court that the reason was that it only learned of the statement after trial had commenced, when Hall testified. When the government itself only becomes aware of the evidence after the start of trial, sanctions are generally not warranted. See United States v. Panzar, 418 F.2d 1239 (5th Cir. 1969).[11] However, McAlpin testified under oath that this was simply not true.

This Court has condemned the tactic of "carelessly or by design" hiding a statement by the defendant "only to spring it in the middle of a trial." United States v. Martinez, 763 F.2d 1297, 1315 (11th Cir. 1985); see also United States v. Noe, 821 F.2d 604, 607 (11th Cir. 1987)(refusing to adopt a rule that would encourage government "trial by ambush" whether intentional or inadvertent). That is precisely what happened here. However, "[i]nadvertence does not render a discovery violation harmless; rather the purpose of rule 16 is to protect a defendant's right to a fair trial rather than to punish the government's non-compliance." Camargo-Vergara, 57 F.3d at 999.

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[11]In Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir.1981), this Court adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

Moreover, the prejudice caused by admission of this statement was substantial. Failure to disclose a statement by the defendant is an especially serious violation. United States v. Rodriguez, 799 F.2d 649 (11th Cir. 1986).

> "We believe that noncompliance with an order to furnish a copy of a statement made by the defendant is so serious a detriment to the preparation for trial and the defense of serious criminal charges that where it is apparent, as here, that his defense strategy may have been determined by the failure to comply, there should be a new trial."

Id. at 654 (quoting United States v. Padrone, 406 F.2d 560, 561 (2d Cir. 1969)). Thus, the extent of prejudice is determined "not simply by weighing all the evidence introduced, but rather by considering how the violation affected the defendant's ability to present a defense." Noe, 821 F.2d at 607 (citing United States v. Pascual, 606 F.2d 561 (5th Cir. 1979)).

For example, in Pascual, the government failed to disclose a letter written by the defendant in violation of Rule 16. 606 F.2d at 564-65. The letter "amounted virtually to a signed plea of guilty." Id. at 565. The letter also corroborated the testimony of a cooperating government witness. Id. The court reversed and

remanded for a new trial.

> It would be hard to make an argument with any degree of plausibility that the use of this letter without prior production did not seriously prejudice the defendants in exercising their option to plead not guilty and in their preparation for trial.

Id. Moreover, the court was unconcerned about the likelihood of the defendant's acquittal on retrial.

> A new trial with this nail in the coffin lid, now fully disclosed, may likely result in another verdict of guilty. Nevertheless, the vindication of Rule 16, and notice to prosecutors in this Circuit that they must effectively comply with it, leave no choice but to reverse these convictions and remand for a new trial.

Id. at 566.

Here, as in Pascual, the alleged 1992 statement amounted to a confession that the defendant was importing narcotics into the United States. Yet the government failed to disclose that statement to the defense. Such a statement has serious implications for plea negotiations and for trial preparation. Putting this

information in the hands of the defense before trial is precisely the reason for Rule 16. See Alvarez, 987 F.2d at 85 (Rule 16 "intended to contribute to the fair and efficient administration of criminal justice by providing the defendant with sufficient information upon which to base an intelligent plea; by minimizing the undesirable effect of surprise at trial; and by contributing to the accuracy of the fact finding process"). The government has been allowed to circumvent those safeguards in this case, to the serious prejudice of Mr. Beharry.

In addition, Officer McAlpin testified that it was because of this incident, and Mr. Beharry's alleged statement when he was pulled over in 1992, that McAlpin was able to identify Mr. Beharry's voice from the taped telephone conversations. (R-576-1217). Also, the very similarity between the 1992 statement and the statements made on the tapes made it more likely that the man on the tapes was Mr. Beharry. Thus, this testimony effectively bolstered other evidence against Mr. Beharry.

The fact that a cooperating witness, Marlon Hall, previously testified to the 1992 statement should provide the government no comfort. Defense counsel learned of the statement for the first time when Hall took the stand at trial. Yet, McAlpin told the government about the statement before trial. If the government had properly disclosed the statement as required by Rule 16, defense counsel would have been prepared to address it at trial when Hall testified.

Moreover, it is one thing when a cooperating government witness testifies to such a statement, but it

is quite another when a police officer verifies the statement, putting a cloak of credibility not only on the statement, but on the cooperating witness as a whole. "When a police officer, who is generally regarded by the jury as disinterested and objective and therefore highly credible is the corroborating witness, the danger of improperly influencing the jury becomes particularly grave." See Charlot v. State, 679 So.2d 844, 846 (Fla. 4th DCA 1996)(Pariente, J. dissenting). Thus, the government's failure to properly disclose the 1992 statement was doubly prejudicial.

By surprising the defense with the testimony about the alleged 1992 statement, the government prevented Mr. Beharry from investigating the alleged 1992 pullover and from finding and offering evidence to show that the incident never occurred. The damage to the defense trial preparation and strategy was significant. This Court should reverse and remand for a new trial.

D. The government improperly withheld the passport of a government witness which was significant impeachment evidence.

The government also violated Rule 16 and Brady v. Maryland, 373 U.S. 83 (1963), by failing to produce the passport of government witness David Nash as requested by the defense. Defense counsel sought production of Nash's passport, which he had turned over to the government. (R-576-1389, 1397; R-577-1456-57). The district court ordered the government to produce it, but inexplicably, the government was unable

to find it. See (R-576-1391; R-577-1397; R-530-14; R.E. 7). The government was again allowed, without penalty, to ignore disclosure requirements, to the severe prejudice of the defendant.

The government violates Brady if (1) the government possessed evidence, including impeachment evidence, favorable to the defense; (2) the defense did not possess nor could have possessed that evidence using reasonable diligence; (3) the government suppressed the evidence; and (4) the evidence was material, i.e., there is a "reasonable probability" that had the evidence been disclosed the trial outcome would have been different. See United States v. Arnold, 117 F.3d 1308, 1315 (11th Cir. 1997).

"[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Kyle v. Whitley, 514 U.S. 419, 434 (1995)(discussing United States v. Bagley, 473 U.S. 667 (1985)). The adjective "reasonable" is important. Id. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. This is not a sufficiency of the evidence test. "The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict." Id. Thus, the analysis must look at the importance of the suppressed evidence, not the weight of the inculpatory evidence.

Nash's passport would have shown that he lied

about the dates when he claimed that he was in the United States, and therefore that events could not have occurred as Nash testified. This was significant impeachment material as it would have thrown into doubt all the testimony by this important witness against Mr. Beharry. Mr. Beharry is entitled to a new trial -- at which time the government must produce the passport or Nash's testimony should be excluded.

E. The cumulative effect of these errors requires a new trial.

Even if this Court finds that none of the trial errors individually requires a new trial, this Court should still reverse because of the cumulative effect of these errors. See United States v. Wood, 207 F.3d 1222 (10th Cir. 2000); Malek v. Federal Ins. Co., 994 F.2d 49 (2d Cir. 1993).

"A cumulative error analysis aggregates all the errors that individually might be harmless, 'and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.'" Id. at 1237 (citation omitted). In addressing a claim of cumulative error, this Court "must examine the trial as a whole to determine whether the appellate was afforded a fundamentally fair trial." United States v. Calderon, 127 F.3d 1314, 1333 (11th Cir. 1997). "[I]f one cannot say, with fair assurance . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." Kotteakos v. United States, 328 U.S. 750, 765 (1946).

The fact that an Allen charge was even

necessary, along with the hung jury on the conspiracy counts in the indictment, highlight the fact that the jury considered this a close case. In this context, the pattern of government deception and suppression of evidence becomes even more significant.

Mr. Beharry did not receive a fair trial. Wade Lalla and David Nash were the only two cooperating witnesses who testified about the February 1994 importations for which Mr. Beharry was convicted. Wade Lalla's testimony was purchased by the government and because of the government's misconduct the defense was unable to properly impeach David Nash's testimony because the government did not produce Nash's passport as required by Rule 16 and Brady. Added to this is the substantial prejudice caused the defendant by the government agents' mispresentations about Carlos Manickchand and failure to disclose the statement allegedly made by the defendant to Trinidadian police in violation of Rule 16. These misrepresentations prevented counsel from adequately investigating and preparing a defense. If this Court does not order the indictment dismissed, the cumulative effect of the government's conduct in this case mandates at least a new trial. This Court should reverse.

CONCLUSION

For the reasons set forth above, Appellant ZIMMERN BEHARRY respectfully requests this Court to dismiss the indictment and repatriate him to Trinidad and Tobago. In the alternative, this Court should remand for a new trial, or at the least remand for

resentencing.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(1) undersigned counsel certifies that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(1) in that it contains 13,495 (13,473) words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on August __, 2000, a true and correct copy of Defendant/Appellant's Criminal Appeal Brief was served by mail to the following:

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By: _____
ROY BLACK, ESQ.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO. 00-11371-J
UNITED STATES OF AMERICA,
Plaintiff/Appellee,
v.
ZIMMERN BEHARRY,
Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

APPELLANT'S REPLY BRIEF

CRIMINAL APPEAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Zimmern Beharry
Case No. App. No. 00-11371-J

Pursuant to 11th Cir. R. 26.1, Appellant Zimmern Beharry files this Certificate of Interested Persons and Corporate Disclosure Statement:

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ARGUMENT

I. MR. BEHARRY WAS ENTITLED TO HAVE THE JURY DECIDE DRUG QUANTITY BY PROOF BEYOND A REASONABLE DOUBT.

Mr. Beharry's indictment did not charge, nor did the jury find, any amount of drugs attributable to Mr. Beharry. (R-179; R-514; R.E. 2). Nonetheless, over objection, he was sentenced to life in prison because of the quantity of drugs attributed to him by the district court at sentencing. (R-587-2957-58; R-549). Under the United States Supreme Court's decision in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), and this Court's recent decision applying Apprendi in United States v. Rogers, 2000 WL 1451907 (11th Cir. Sept. 29, 2000)(Apprendi applicable to §841), Mr. Beharry is entitled to at least a resentencing under 21 U.S.C. §§ 841(b)(1)(C) and 960(b)(3).[12]

Plain Error Standard Not Applicable. First, Mr. Beharry objected at sentencing to the quantity of drugs attributed to him for sentencing purposes, and to the standard used by the court to make that

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[1]Although this Court ruled in Rogers that the appropriate remedy is resentencing, Appellant does not concede that this is the proper remedy.

determination. See (R-545; R-546; R-587-2947). At that time, the law in this Circuit was clear that drug quantity was to be determined by the district judge at sentencing under the preponderance of the evidence standard, and not by the jury. See United States v. Hester, 199 F.3d 1287 (11th Cir. 2000). Indeed, this Court had explicitly and unequivocally rejected any argument that the Supreme Court's opinion in Jones v. United States, 526 U.S. 227 (1999), indicated otherwise. Hester, 199 F.3d at 1291. Because the Supreme Court's opinion in Apprendi was not released until after Mr. Beharry's sentencing, the objections made at sentencing sufficiently preserved the issue for de novo review. See Rogers, 2000 WL 1451907; United States v. Angle, 2000 WL 1515159 (4th Cir. Oct. 12, 2000).

Further, Mr. Beharry's argument was also based on the failure of the government to set forth all elements in the indictment, an issue which may be raised at any time. See Fed.R.Crim.P. 12(b)(2); but see United States v. Mojica-Baez, 2000 WL 1211013 (1st Cir. June 8, 2000).

This Court's decision in United States v. Swatzie, 2000 WL 1421337 (11th Cir. Sept. 27, 2000), does not mandate applying the plain error standard in this case. In Swatzie, unlike this case, the defendant made only a pro forma objection to the presentence report's findings on drug quantity. Id. at *1. This Court therefore found that objection insufficient to preserve the issue and applied a plain error standard of review. See id. at *2-3. By contrast, Mr. Beharry's

objections to drug quantity were substantially more than pro forma. From the time defense counsel filed objections to the presentence report through the actual sentencing, Mr. Beharry vigorously challenged his guilt, the amount of drugs attributed to him, and the standard for making that determination. This issue was preserved, and Mr. Beharry is entitled to the benefit of the new law set forth in Apprendi and Rogers in this direct appeal. See Griffith v. Kentucky, 479 U.S. 314 (1987).

Plain Error Standard Met. Second, even under the plain error standard, Mr. Beharry is still entitled to relief. Under that standard, the appellant must show "(1) error, (2) that is plain, and (3) that affect[s] substantial rights" and (4) that "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Johnson v. United States, 520 U.S. 461, 466-67 (1997). The government at 20 concedes the first two elements of this test.

The error also significantly affected Mr. Beharry's substantial rights. This Court in Swatzie applied the harmless error approach used in Neder v. United States, 527 U.S. 1 (1999), to analyze this requirement.[13] 2000 WL 1421337. Under that standard, the court must reverse if there is "grave doubt" that the plain error "had substantial influence"

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[2]But see United States v. Nordby, 225 F.3d 1053, 1062 (9th Cir. 2000) (Reinhardt, J. concurring specially)(arguing against application of Neder approach in this context).

on the outcome. Swatzie, 2000 WL 1421337.

The best evidence that this plain error affected Mr. Beharry's substantial rights is the fact that he received a mandatory life sentence under 21 U.S.C. §841(b)(1)(A) and §960(b)(1)(B) instead of a maximum of 20 years under §841(b)(1)(C) and §960(b)(3). See United States v. Anderson, 201 F.3d 1145, 1152 (9th Cir. 2000). "An error that results in a longer sentence undoubtedly affects substantial rights." Id.; see also United States v. Nordby, 225 F.2d 1053, 1060 (9th Cir. 2000) (recognizing this as one approach to determining if plain error affected substantial rights).

Unlike the defendant in Neder, Mr. Beharry was essentially sentenced for different crimes from the ones for which he was convicted and his sentence exceeded the statutory maximum for the crimes for which he was actually convicted. In Neder, the defendant was convicted and sentenced for the same crime -- the jury simply was not given all the elements of that crime. See 527 U.S. at 5. By contrast, under the jury's verdict, Mr. Beharry was convicted of one set of crimes -- possession and importation of an unspecified amount of cocaine base under §§ 841(b)(1)(C) and 960(b)(3), see Rogers, 2000 WL 1451907, but was sentenced for a different set of crimes -- possession and importation of a specific quantity of cocaine base under §§841(b)(1)(A) and 960(b)(1)(B). Sections 841(b)(1)(C) and 960(b)(3) carry a maximum penalty 20 years in prison. Mr. Beharry was sentenced to life.

In United States v. Meshack, 225 F.3d 556 (5th Cir. 2000), the Fifth Circuit applied Apprendi to the

sentences of two co-defendants using the plain error standard. The court found no violation of defendant Hodges' substantial rights because Hodges could not show that he received a longer sentence for possession of marijuana than he would have if the error had not been committed. Id. at 577. However, the court found that a different result was necessary for defendant Meshack under the plain error standard because his life sentences were "longer, at least in theory, than" concurrent sentences he received on other counts under §841(b)(1)(C). Id. at 578. The court therefore vacated Meshack's life sentences and remanded for resentencing. Id.

The same reasoning and result should apply here. This Court should find that Mr. Beharry's substantial rights have been affected and vacate his life sentences because they are longer, at least in theory, than the 20 year maximum he could have received under §§841(b)(1)(C) and 960(b)(3).

Moreover, as the circumstances of this case are far different from those this Court found insufficient in Swatzie they mandate a different result. In Swatzie, 2000 WL 142337, the defendant offered no evidence at trial and made only a pro forma and conclusory objection to the drug quantity listed in the presentence report. When Swatzie was arrested, he led the authorities to more than 100 grams of cocaine and around twenty grams of cocaine base in his house. Id. at *4. He admitted possession of the cocaine and cocaine base and offered no evidence to dispute that he had made that admission. Id. Indeed, even when given

the opportunity at sentencing, he "did not seek to discredit the sources of the evidence against him." Id. Under those circumstances, where there was no "real dispute" over drug quantity, this Court stated that "we can confidently say that whatever the circumstances in some cases may be, there is not a grave doubt here about the lack of effect." Id. at *5; see also id. at *4 n.3. Moreover, Swatzie did not even "hint[] that, for lack of notice from the indictment, he had difficulty disputing the issues of either the kind of drugs or the quantity." Id. at *6.

In dramatic contrast to Swatzie, Mr. Beharry vigorously defended the charges against him and presented evidence in his defense. Mr. Beharry's first "Objections to the Presentence Investigation Report and Motion for Downward Departure," began with an overall objection to the factual allegations in the PSI regarding the offense conduct and an objection "to having joined any drug conspiracy or having been involved in any drug activities." (R-545). Mr. Beharry also objected to the proposed drug quantity in the PSI as there was no specific credible information regarding drug amounts -- most of the information came from cooperating government witnesses who admitted they lied to the government about Mr. Beharry's alleged involvement with narcotics. (R-545, 546, 548, 587). Moreover, the vast majority of drugs attributed to Mr. Beharry at sentencing came from incidents that would have been part of the broad conspiracies the government alleged Mr. Beharry participated in, but which the jury rejected. See (R-545; R-587). Mr.

Beharry further objected to and moved to strike the many factual allegations in the PSI not derived from trial testimony. (R-545, 546, 548, 587). These objections went far beyond the pro forma objections made in Swatzie.

The Ninth Circuit addressed a similar situation in Nordby, 225 F.3d 1053. In that case, the uncontested evidence at trial was that 2000 marijuana plants were found growing on the defendant's land. Id. at 1060. Yet, the defendant consistently maintained his innocence and presented evidence in his defense, even at sentencing. Id. at 1060-61. For example, the evidence showed that he had been away for most of the time the marijuana crop had been growing, although he returned several days before he was arrested. Id. at 1060. The court found that even under the Neder test, the defendant's substantial rights had been affected and remanded for resentencing. Id. at 1061-62.

Similarly, here, Mr. Beharry contested his guilt at trial, and continued to maintain his innocence at the time of sentencing. No witness saw Mr. Beharry in possession of cocaine. See (R-576-1330-33; R-577-1535, 1556). Indeed, Mr. Beharry was not even named in relation to this case until the Fourth Superseding Indictment. See (R-145). Despite the government's attempts to describe the evidence in this case as "overwhelming," the jury nonetheless must have disagreed as it refused to convict Mr. Beharry of the broad conspiracy charges against him. See (R-514).

Although the government submitted evidence of admissions by Mr. Beharry to drug trafficking, both

before and during trial Mr. Beharry challenged admission of that evidence,[14] the authenticity of the tape recordings, and the accuracy of the testimony. E.g., (R-425). More importantly, those statements were not admissions to participating in the two specific importations for which Mr. Beharry was convicted. See (R-576-1229, 1231, 1309; R-578-1862). In spite of this evidence, the jury did **not** convict Mr. Beharry of the broader conspiracy charges against him.

The government also relies heavily on statements by defense counsel in sentencing motions and at the sentencing hearing, taken out of context, that the defendant was responsible for 46 kilograms of cocaine. This reliance is misplaced and mischaracterizes the circumstances of defendant's sentencing.

First, statements made by the defendant or his attorney for the purposes of sentencing are irrelevant to this inquiry. "By its own terms the harmless error/substantial rights inquiry is directed at whether the error affected the jury's verdict." Nordby, 225 F.3d at 1061 n.6. Statements made at sentencing could not have affected the jury's verdict.

Second, those remarks must be viewed in the context of Mr. Beharry's sentencing. After making overall challenges to all of the factual allegations in the PSI, including his guilt and drug quantity, Mr. Beharry

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[3]In fact, Mr. Beharry continues to challenge admission of some of that evidence in this Court. See Appellant's Initial Brief at 48.

went on to argue that the largest quantity of drugs for which he could be held responsible was the 46 kilograms of cocaine allegedly involved in the two shipments for which he was convicted. (R-545-2). Similar arguments were made at the sentencing proceeding, where defense counsel meticulously objected to specific amounts and sources for the PSI's allegations of drug quantity. See (R-587-2968, 2971-72). Defense counsel also argued that the district court should apply a higher standard than preponderance of the evidence.[15] (R-587-2947).

Thus, in context, neither Mr. Beharry or his defense counsel admitted that Mr. Beharry was responsible for 46 kilograms of cocaine base. Instead, counsel argued that if any drug quantity were to be attributed to Mr. Beharry, 46 kilograms was the most that could be found, and then only **by a preponderance of the evidence**, not beyond a reasonable doubt.

Moreover, any analysis of the evidence of drug quantity presented at trial must take into account the fact that drug quantity was not listed in the indictment. Because it was not listed in the indictment, Mr. Beharry had no notice of the significance of drug quantity to the overall verdict. Under the state of the law at the time of

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[4]There is some support in the law of other circuits for applying a clear and convincing standard during sentencing where the fact at issue would dramatically increase the sentence. See United States v. Watts, 519 U.S. 148, 156 & n.2 (1997)(collecting cases).

Mr. Beharry's trial, the government was not required to allege or prove a specific drug quantity. Moreover, the determination of drug quantity would be made by the district court by a preponderance of the evidence at sentencing. Thus, there was no legal basis for the defense to contest the amounts alleged to be part of those shipments at trial. Indeed, as drug quantity would not have been treated as an element of the offense, any attempt by the defense to focus on those drug quantity would have only confused the jury and detracted from the overall defense that Mr. Beharry was simply not involved. Further, given the relatively low preponderance of the evidence standard, there was no legal basis to challenge the quantity of drugs from those shipments at sentencing either. As the jury rejected the broader conspiracy charges brought by the government, there is a significant probability that the jury would also have rejected the quantities alleged by the government. The third element of the plain error test is amply satisfied in this case.

Lastly, if this is not a situation that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings," it is difficult to see when that standard would ever be met. As the Supreme Court stated in Apprendi, "[a]t stake in this case are constitutional protections of **surpassing importance**: the 'due process of law,' and the guarantee that '[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.'" 120 S.Ct. at 1255 (citations omitted, emphasis added). Indeed, "[t]he rights to jury trial and a determination of

guilty beyond a reasonable doubt are the bedrock of our constitutional system of justice. Moreover, fairness is undermined when a court's error 'impose[s] a longer sentence than might have been imposed had the court not plainly erred.'" Nordby, 225 F.3d at 1061 (citations omitted).

The fairness of our justice system is also seriously undermined where, as here, a defendant is convicted for one crime, but sentenced for another--far more serious--crime. This is especially true where the jury has rejected much of the government's evidence. Mr. Beharry was deprived of the right to have notice in the indictment of the full extent of the charges against him, and to have all the elements of those charges determined by the jury beyond a reasonable doubt. Even under the plain error standard, Mr. Beharry is entitled to at least a resentencing.

Rationale of *Apprendi* applies to Federal Sentencing Guidelines. Although the federal sentencing guidelines were not before the Supreme Court when it decided Apprendi, the Court clearly telegraphed that it would apply the same constitutional considerations when a sentencing court, using the Guidelines, significantly increases a defendant's sentence based on elements not presented the jury. The Court stated as it's rationale that "'it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" 120 S.Ct. at 2363

(citation omitted). Moreover,

> it can hardly be said that the potential doubling of one's sentence--from 10 years to 20--has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance.

Id. If the difference of 10 years -- from 10 to 20 years -- is of "unquestionable constitutional significance," then the variation here, between 10 years and life, must be as well. Drug quantity is the single most important factor in determining the sentence within that range.

If Congress, a constitutional body elected by the people, cannot constitutionally remove from the jury the assessment of facts that more than double a potential criminal sentence, then it simply cannot be constitutional for the statutorily created, appointed, United States Sentencing Commission to do so. Moreover, as Justice Thomas points out in his concurring opinion in Apprendi, the Sentencing Guidelines "'have the force and effect of laws.'" 120 S.Ct. at 2380 n.11 (Thomas, J. Concurring)(quoting Mistretta v. United States, 488 U.S. 361, 413 (1989)(Scalia, J. Dissenting)). Justice Scalia's concurrence also implies that the Sentencing Guidelines

would come within the reasoning of Apprendi by stating that the right to trial by jury "has no intelligible content unless it means that all the facts which must exist in order to subject the defendant **to a legally prescribed punishment** must be found by the jury." 120 S.Ct. at 2367 (Scalia, J. Concurring)(emphasis added).

A contrary reading of Apprendi would allow the legislature to provide a statutory maximum of life imprisonment for **all** crimes, with the primary determinative factor for sentencing within that maximum dictated by the Guidelines. Indeed, Justice O'Connor suggested that interpretation of the majority opinion in her dissent, 120 S.Ct. at 2388-90 (O'Connor, J. dissenting), but the majority rejected it and questioned the constitutionality of such a statutory scheme. See 120 S.Ct. at 2363 n.16.

Yet, precisely that type of statutory scheme is at work here. The statutory sentencing range for these offenses is 10 years to life, and drug quantity is the single most important factor in determining what the punishment will be within that enormous range under the Guidelines. In United States v. Watts, 519 U.S. 148 (1997), the Court recognized that although it has ruled in McMillan v. Pennsylvania, 477 U.S. 79 (1986), "that application of the preponderance standard at sentencing **generally** satisfies due process," that case left open the possibility that due process would require a higher standard when the relevant conduct would "dramatically increase" the sentence, and some circuits have so held. Watts, 519 U.S. At 156 & n.2 (collecting cases,

emphasis added). For example, the Eighth Circuit stated in United States v. Townley, 929 F.2d 365, 369 (8th Cir. 1991), that "[a]t the very least, McMillan allows for the possibility that the preponderance standard the Court approved for garden variety sentencing determinations may fail to comport with due process where, as here, a sentencing enhancement factor becomes 'a tail which wags the dog of the substantive offense.'"

The Supreme Court was not presented with that situation in Watts. See 519 U.S. at 156-57. However, where, as here, drug quantity determines whether a defendant is sentenced to 10 years or is sentenced to more than 20 years or life, it becomes "a tail which wags the dog of the substantive offense." See McMillan. Apprendi suggests that due process requires that drug quantity be determined by a jury beyond a reasonable doubt. Indeed, the Court in Apprendi made it clear that "the relevant inquiry is one not of form, but of effect -- does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" 120 S.Ct. at 2365. The answer here must be yes. Especially as the jury's verdict found Mr. Beharry guilty of only an undetermined amount of cocaine, the maximum punishment should be 20 years.

The cases cited by the government do not mandate a contrary result. In none of those cases was the Supreme Court squarely presented with a due process challenge to allowing the district court to determine the single most significant factor in

sentencing drug cases under the Guidelines -- drug quantity. Watts, 519 U.S. 148, and Witte v. United States, 515 U.S. 389 (1995), both involved double jeopardy challenges to the Guidelines scheme for drug convictions, not due process.

In Edwards v. United States, 523 U.S. 511 (1998), which in some ways telegraphed the Court's later decision in Apprendi, the Court addressed a challenge to district court determination of the type of drug, not quantity. Moreover, the Court did not address the constitutional question directly because in that case the defendant raised the argument for the first time on appeal, but did not show how he had been prejudiced. Id. at 514-15. In fact, the Court noted that in that particular case the type of drug would not have made any difference. Id.

In sum, Mr. Beharry's indictment, conviction, and sentence violated his Fifth and Sixth Amendment rights. Even under the plain error standard, Mr. Beharry is entitled to at least resentencing for the offenses of which he was convicted: 21 U.S.C. §§ 841(b)(1)(C) and 960(b)(3).

II. THE DISTRICT COURT ERRED BY GIVING AN ALLEN CHARGE WHEN ONE JUROR HAD EXPRESSED FEAR FOR HER SAFETY IN THE JURY ROOM.

This case presents perhaps the best example of

when an Allen charge has an unduly coercive impact on the jury -- where the dissenting juror informs the court that she fears for her **physical safety** in the jury room. Nonetheless, the government claims that the district court did not abuse its discretion in giving the charge over defense objection. The government's argument ignores reality.

Significantly, the government concedes at 30 that Juror Best expressed concern for her physical safety. Indeed, she voiced that fear more than once. It was the way she first came to the attention of the court. The district court received several notes from the jury. One stated that "we have considered only one count and we are stuck." (R-585-2810). The second note stated that the Juror 8 "does not feel **safe** in the jury room and needed the bailiff." (R-585-2810)(emphasis added).

That note, clearly stating Juror Best's concern for her **safety**, was the reason the district court spoke to her outside the presence of the other jurors. (R-585-2832). At that time, this strong, independent woman was visibly upset and crying, even though she stated that she rarely cried. See (R-585-2833, 2836). Twice during her interview with the district judge, Juror Best clearly expressed her fear for her physical safety:

> THE COURT: Now I want to ask you, do you feel or do you have a concern for your **physical safety**?
>
> MS. BEST: **At certain moments in there, yes**.

* * *

MS. BEST: Well, I haven't been struck.

THE COURT: But are you in fear that could happen?

MS. BEST: I think the conversations, tones, and level of the voice . . . **But I think that that could move to something more physical** . . . .

(R-585-2834-36)(emphasis added).

The district court used the word "civility" to describe the discussion in the jury room; it was not Juror Best's word. See (R-585-2834-36). She also clearly stated that "civility" was only "**part of it**." (R-585-2834-26)(emphasis added). Moreover, her acquiescence in that description makes sense in context: She had not been stuck yet, and loud, foul language had been used. See (R-585-2834-36); see also Random House Webster's Unabridged Dictionary 378 (2d ed. 1998)(defining "civil" as "adhering to the norms of polite social intercourse"). However, the lack of "civility" was so severe that she was brought to tears, and feared for her physical safety. Indeed, the juror's first note indicated that she needed that the bailiff, a law enforcement officer, to be inside the jury room for her protection.

This clearly expressed concern for her physical safety distinguishes this case from all the cases cited by the government where an Allen charge was affirmed. None involved a juror's expressed concern for her physical safety in the jury room.

Nor, in context, is there any reasoned doubt that Juror Best was a holdout. There would be no reason for the other jurors to express such hostility towards her otherwise. More importantly, after speaking with the district judge, Juror Best knew that the judge was aware of her concerns, and gave the Allen charge anyway. See United States v. Sae-Chua, 725 F.2d 530 (9th Cir. 1984). The government's argument that the district court did not know that Juror Best was a dissenting juror also ignores reality.

Furthermore, after the district court gave the Allen charge, the jury, which had struggled for several days to reach a verdict on one count, returned a verdict on three more counts in a matter of hours. Although by itself this may not suggest coercion, in the context of Juror Best's expressed concerns for her physical safety, the speed with which the jury returned a verdict is very telling. See United States v. Bonam, 772 F.2d 1449, 1451 (9th Cir. 1985)("A jury verdict reached immediately after an Allen charge can be an indication of coercion.").

A comparison of this case and those cited by the government highlights the problem with giving the charge in this case. In none of those cases was there even any evidence of extreme frustration by the jurors over the deadlock -- let alone the potential for physical coercion. For example, the court in Bonam expressly noted that there was "**no indication** that the instruction was given in an atmosphere of **frustration** over the deadlock and no indication that the trial judge knew how the jurors stood." Id. at 1451 (emphasis added).

The court also noted that the jury in that case had only one relatively simple issue to resolve. Id. By contrast, here there were multiple complex charges to consider and clear evidence of an atmosphere beyond mere frustration in the jury room.

In United States v. Chigbo, 38 F.3d 543 (11th Cir. 1994), the district court gave the Allen charge immediately after discovering from the jury poll that the verdict was not unanimous. There was no indication that the deliberations had been anything less than civil. Under those circumstances, the fifteen minutes the jury took to return a unanimous verdict was as likely to have been an indication of confusion by the jurors as it was of coercion. See id. at 545.

Similarly, the jury in Andrews v. United States, 309 F.2d 127 (5th Cir. 1962), had only been deliberating an hour and five minutes before the district court gave the Allen charge -- hardly enough time to build excessive frustration. By contrast, here the jury had deliberated for several days before the charge was given.

Lastly, the government's reliance on United States v. Alonso, 740 F.2d 862 (11th Cir. 1984), and United States v. Gordon, 817 F.2d 1538 (11th Cir. 1987), vacated in part on other grounds, 836 F.2d 1312 (11th Cir. 1988), is misplaced. Again, neither case involved expressed fears by a juror for her physical safety in the jury room. Moreover, in Alonso, cited in Gordon, the jury did not even begin to return verdicts on the remaining counts until **five days** after the district court gave the Allen charge. 740 F.2d at 878. Others

verdicts were returned more than a week after the charge. In contrast to the length of time between the charge and the verdicts in Alonso, the quick verdict in this case clearly indicates that the Allen charge had a coercive effect on Mr. Beharry's jury.

Given the severity of Juror Best's expressed concerns for her physical safety, the complexity of the issues, and the relative speed with which the jury returned verdicts on counts on which it had previously been deadlocked for days, the circumstances overwhelmingly show that giving an Allen charge was inherently and unduly coercive. This case must be reversed and remanded for a new trial.

III. THE GOVERNMENT ENGAGED IN A PATTERN OF MISCONDUCT THAT SUBSTANTIALLY PREJUDICED MR. BEHARRY.

The most significant problem with the government's response is that it dismisses out of hand the cumulative effect of the government misconduct in this case. The fact that an Allen charge was even necessary, along with the hung jury on the conspiracy counts, highlights the fact that the jury considered this a close case. In this context, the pattern of government deception and suppression of evidence becomes even more significant.

Mr. Beharry did not receive a fair trial. Wade

Lalla and David Nash were the only two cooperating witnesses who testified about the February 1994 importations for which Mr. Beharry was convicted. Wade Lalla's grand jury testimony was purchased by the government and because of the government's misconduct the defense was unable to properly impeach David Nash's testimony because the government did not produce Nash's passport as required by Rule 16 and Brady. Added to this is the prejudice caused by the government agents' misrepresentations about Carlos Manickchand and failure to disclose the statement allegedly made by the defendant to Trinidadian police in violation of Rule 16. These misrepresentations prevented counsel from adequately investigating and preparing a defense both for extradition and later for trial. The government attempts to explain away, rationalize, and misdirect the court's attention from the real issue in this case: What government actions are we as a society willing to tolerate in pursuit of a criminal conviction? Mr. Beharry respectfully suggests that the government's actions in this case, especially when viewed as a whole, go beyond what should be acceptable in a free society.

For example, although government agents sometimes need to protect the identity of confidential informants, the proper procedure should be to seek a protective order, not to unabashedly lie to the grand jury or the court and then claim some administrative rule permits lying in court. The government does not have the right to decide how much truth the court is entitled to. See United States v. Sterba, 22 F.Supp.2d 1333,

1338 (M.D.Fla. 1998). Yet that is precisely what Agent Duffy did.

Agent Duffy's testimony at trial shows how deliberate the lie was. He claimed his statements had been technically correct because they referred to the fictitious Carlos Manaracha, not Carlos Manickchand -- even though he knew that there was no such person as Carlos Manaracha. (R-578-1830-31). Indeed, Agent Duffy stated that if he had not been otherwise instructed by the court, he would have continued to testify that the person with Wade Lalla was Carlos Manaracha -- a fugitive. (R-578-1831-32). After all, he had already given such testimony in the separate trial of alleged co-conspirator Rampresad. See (R-529-Exh.E). Significantly, unlike Duffy, AUSA Reinhart recognized during trial that without the court's order Duffy would not be answering "truthfully." (R-578-1818).

Carlos Manickchand was not a co-conspirator or a fugitive -- he was an informant working for Agents Duffy and Mancini all along. (R-578-1830). This was a deliberate and calculated lie, chosen to make it seem as though there was another individual working with Mr. Beharry who managed to get away. These actions violated Mr. Beharry's due process rights and the extradition treaty between the United States and Trinidad.

The government suggests that perhaps some of the problems were transcription errors, that the statements made were not before the grand jury at the precise time Mr. Beharry was indicted, and that transcripts of that grand jury would show no

misrepresentations were made at that time. First, the government's claims at 36 that the name discrepancy was merely a product of confusion and transcription error is mere speculation and is belied by Agent Duffy's and AUSA Reinhart's statements at trial, and by a comparison of statements made by the government at different times in this prosecution. See (R-524, 55, 529, 530, 533, 538). Second, there was a whole chain of indictments in this and related cases. By the time Mr. Beharry was first indicted, the government was on its fifth indictment (Fourth Superseding Indictment). (R-145). There were also related cases involving co-defendant Wade Lalla and others. Moreover, the same government witnesses made the same misstatements in affidavits to the court in Trinidad. See (R-533-Exh.G; R-578-1826, 1841-42). Arguing that some of the statements quoted were from a different grand jury hearing from the one in which Mr. Beharry was indicted misses the point.[16]

The government's argument about the effect of these misstatements on Mr. Beharry's extradition similarly misses the point. First, the treaty required "sufficient evidence" that the person sought to be extradited committed the alleged offense. See

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[5]Appellant is also concerned about the government's claim at 39 n.19 that it can prove no misstatement were made in Mr. Beharry's grand jury with transcripts. If there is additional grand jury testimony by Agent Duffy, it should have been turned over to the defense under Jencks.

Extradition Treaty Between the U.S. And Great Britain of 1931, arts, 9, 11, 47 Stat. 2122. "Sufficient evidence" simply cannot include known falsehoods. Any other interpretation makes a mockery of our treaty obligations. Second, it is up to the foreign court to determine if the evidence is sufficient. However, as the truth was not known until trial, the court in Trinidad was not aware that U.S. Government agents were lying, and so could not accurately gauge their credibility. Moreover, those misrepresentations prevented Mr. Beharry from investigating the government's primary source of information and from presenting evidence to the court in Trinidad about that individual.[17] As the extraditing court denied the request for extradition on some of the charges, it clearly was carefully weighing the evidence presented. The government's conduct violated the treaty and severely prejudiced Mr. Beharry.

Next, it simply cannot be permissible for the government to pay a cooperating witness $5,000 for "securing the indictment" in a case. As Wade Lalla testified before Mr. Beharry's grand jury, a fact the government does not dispute, it was payment for

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[6]The government at 43 also makes the ludicrous statement that it "was under no obligation to disclose the last name of defendant's own employee." However, Mr. Beharry had not been adjudicated guilty at the time disclosure was required. The government is not entitled to choose how to respond to discovery requests based on assumptions that would only be valid if the defendant were guilty.

"testimony" prohibited under 18 U.S.C. § 201(c)(2).

Moreover, contrary to the government's claims, the evidence that this was in fact why Wade Lalla was paid comes not only from the government's own voucher, compelling by itself, but from Lalla's testimony at trial. See (R-577-1607). Also, no request for hearing was made in Mr. Beharry's post trial motions because the District Court had already stated a hearing would be granted on this issue, no request for hearing was necessary. See (R-2349). Nonetheless, the district court denied the motions without a hearing. See (R-538).

The government's payment of a cash reward to its main cooperating witness sets this case apart from other cases dealing with illegal procurement of the testimony of government witnesses. Unlike leniency or expense money, there is no long-established statutory or historical basis for allowing prosecutors to pay cash rewards for securing an indictment. See United States v. Hunte, 193 F.3d 173 (3d Cir.1999); United States v. Condon, 170 F.3d 687 (7th Cir. 1999).

In Nixon v. Shrink Missouri Government PAC, 120 S.Ct. 897 (2000), the Supreme Court upheld the constitutionality of a Missouri statute limiting to $1,000 individual contributions to state political candidates. Concerned about the integrity of our electoral process, Justice Souter explained that capping individual political contributions is necessary because money corrupts. See id. at 905. Contributions exceeding $1,000 can pervert the electoral process and motivate officials to act contrary to their obligations. See id.

In our case, the evidence shows that the DEA paid Wade Lalla five times that amount to secure the indictment against Mr. Beharry. Moreover, once Lalla testified a certain way under oath, he would of necessity testify the same way at trial. Thus, that payment tainted Lalla's trial testimony as well. The government's argument that the payment and admission of Lalla's testimony is permissible ignores reality.

Significantly, the government does not dispute either that the government failed to disclose Officer MacAlpin's testimony or the witness Nash's passport was lost while in the possession of the government. These are simply further examples of the pattern of government misconduct in this case.[18] And that pattern is why this case is so disturbing. If this Court does not order the indictment dismissed, the cumulative effect of the government's conduct in this case mandates at least a new trial. This Court should reverse.

CONCLUSION

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[7]By alleging that this was part of the pattern of government misconduct in this case, Appellant has implicitly alleged that the loss of Nash's passport was not a mere mistake. This distinguishes this case from United States v. Rodriguez, 917 F.2d 1286 (11th Cir. 1990), vacated in part on other grounds, 935 F.2d 1941 (11th Cir. 1991). Without an evidentiary hearing it is impossible to know how or why it was misplaced. However, the district court denied a hearing on this issue when it denied a hearing on Mr. Beharry's post-trial motions. See (R-538).

For the reasons set forth above, Appellant ZIMMERN BEHARRY respectfully requests this Court to dismiss the indictment and repatriate him to Trinidad and Tobago. In the alternative, this Court should remand for a new trial, or at the least a resentencing.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(1) undersigned counsel certifies that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(1) in that it contains 6,369 words.

Respectfully submitted,
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on November __, 2000, a true and correct copy of Defendant/Appellant's Criminal Appeal Brief was served by mail to the following: Sangita Rao, Esq., Department of Justice, Criminal Appellate Section, 601 D Street, N.W.,Suite 6206, Washington, DC 20530

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Supreme Court U.S.
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No. 01-1165

In the Supreme Court of the United States

ZIMMERN BEHARRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court committed reversible error by sentencing petitioner to life imprisonment for importing cocaine and possessing with intent to distribute cocaine in the absence of allegations in the indictment and jury findings on the threshold quantities of drugs involved in petitioner's offenses.

2. Whether the district court's instructing deadlocked jurors in a manner that was a modification of the charge in *Allen* v. *United States*, 164 U.S. 492 (1896), was impermissibly coercive.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (1 Pet. App. 23-31) is not reported, but the judgment is noted at 265 F.3d 1062 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2001 (1 Pet. App. 24). The petition for rehearing was denied on October 22, 2001 (1 Pet. App. 60). The petition for a writ of certiorari was filed on January 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts of importing cocaine, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 2, and two

counts of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Petitioner was sentenced to concurrent terms of life imprisonment on each count of conviction, to be followed by five years' supervised release. The district court also imposed a fine of $250,000 and a special assessment of $200. The court of appeals affirmed. Gov't C.A. Br. 2-3; 1 Pet. App. 25.

1. Petitioner, a citizen and resident of Trinidad and Tobago (Trinidad), headed a cocaine trafficking organization based in Trinidad. Petitioner also maintained a drug distribution network based in New York for selling the drugs once they arrived in the United States. Gov't C.A. Br. 3-4.

In particular, petitioner was responsible for importing 20 kilograms of cocaine into Port Everglades, Florida, on February 2, 1994. Petitioner's organization recruited two crew members aboard the methanol tanker *Hybur Intrepid* to carry the cocaine. When the tanker arrived in Port Everglades on February 2, 1994, David Nash, one of petitioner's associates, made contact with the crew members carrying the cocaine and retrieved from them 30 kilograms of cocaine. According to Nash, 20 kilograms of the cocaine belonged to petitioner, and ten kilograms belonged to another individual. As Nash was leaving the dock in a taxi, federal agents arrested him and seized the 30 kilograms of cocaine. Gov't C.A. Br. 7-9.

Petitioner also arranged for the importation of 36 kilograms of cocaine into Port Everglades around February 10, 1994. In order to eliminate the risk of authorities discovering drugs carried by crew members, petitioner had devised a new manner of transportation. Under the new plan, the drugs would be secreted in sealed containers and placed in cargo ships

that stopped in the United States on their way to other ports. While the containers were in a bonded warehouse in the United States, someone with access to the warehouse would break into the containers, retrieve the drugs, and reseal the containers. In early February 1994, the cargo ship *Anglia* left Trinidad en route to Pakistan via Port Everglades, carrying six plastic pails containing petitioner's drugs. The *Anglia* docked in Port Everglades on February 9, 1994. Petitioner arranged for Chris Beecham to retrieve the drugs that had been secreted in the *Anglia*'s cargo. On February 10, 1994, another associate of petitioner's, Wade Lalla, picked up the drugs from Beecham's home. As he was driving away, Lalla was arrested by federal agents, who recovered 36 kilograms of cocaine from the trunk of Lalla's car. Gov't C.A. Br. 9-11.

2. On July 3, 1996, a grand jury sitting in the Southern District of Florida returned a ten-count indictment charging petitioner with various narcotics trafficking offenses. See Fifth Superseding Indictment 1-8. The indictment did not allege drug quantities; it referred to each alleged offense as involving "a detectable amount of cocaine." *E.g.*, *id.* at 1.

The United States submitted a request to the government of Trinidad for the extradition of petitioner. Trinidad surrendered petitioner on the first eight of the ten counts charged in the indictment. Before trial, the district court dismissed without prejudice two of the eight counts on venue grounds (Indictment Counts Two and Six). Petitioner was tried before a jury on the remaining six counts, which were renumbered when submitted to the jury as follows: one count of conspiring to import cocaine, in violation of 21 U.S.C. 952(a), 963 (Renumbered Count One); two counts of importing cocaine, in violation of 21 U.S.C. 952 (a) and 18 U.S.C. 2

(Renumbered Counts Two and Three); one count of conspiring to possess cocaine with the intent to distriute it, in violation of 21 U.S.C. 846 (Renumbered Count Four); and two counts of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Renumbered Counts Five and Six). Gov't C.A. Br. 2-3.

Petitioner did not request an instruction at trial requiring the jury to find the quantity of drugs involved in any of his offenses, and the court gave no such instruction in its jury charge. Gov't C.A. Br. 13.

On a Friday afternoon, after approximately three days of jury deliberations, the court received two notes from the jury, one stating that it was "stuck" and another stating that Juror 8, Carol Best, "d[id] not feel safe in the jury room" and needed the courtroom deputy. Trial Tr. 2811; Gov't C.A. Br. 26. After the court questioned Juror Best, who appeared emotionally upset, the court concluded that she was not in fact in fear of her physical safety, and Juror Best confirmed that she was upset over the "civility in the discussion." Trial Tr. 2834; Gov't C.A. Br. 26-28. During the court's inquiry of Juror Best, which defense counsel conceded was "careful" and did not "intrude upon the discussions and thought process of the jury" (Pet. C.A. Br. 29), Juror Best indicated only that other jurors had opinions contrary to hers; she never stated that she was the lone dissenter, or even that she was in the minority. Gov't C.A. Br. 30-31. The court thereafter instructed the jurors on the importance of treating each other with civility and respect and adjourned jury deliberations until Monday. *Id.* at 27.

After the jury resumed deliberations the next Monday, the court received a jury note at about 1:40 p.m. stating, "We are unanimous on Count 5, we are

hung on counts 2, 3, 4, 6, and feel we cannot make any further progress, this is unanimous." Trial Tr. 2846, 2850. Thereafter, over defense counsel's objection, the court delivered an *Allen* charge, see *Allen* v. *United States*, 164 U.S. 492 (1896), which even-handedly instructed both those favoring acquittal and those favoring conviction to reconsider the views of their fellow jurors, while at the same time cautioning the jurors that "no juror is expected to give up an honest belief he or she may have as to the weight or the effect of the evidence." Trial Tr. 2856-2858; Gov't C.A. Br. 28-29. After another one and one-half hours of deliberation, the jury returned a unanimous guilty verdict on Renumbered Counts Two and Three (importing cocaine) as well as on Five and Six (possessing cocaine with the intent to distribute it), but were deadlocked on Renumbered Counts One and Four (drug conspiracy). The court declared a mistrial on Renumbered Counts One and Four, and accepted the jury's guilty verdict on the other four counts.[1] Gov't C.A. Br. 29.

3. The Probation Department prepared a Presentence Report (PSR). The PSR assigned defendant a base offense level of 38, corresponding to a quantity of 150 kilograms or more of cocaine, U.S.S.G. § 2D1.1(c)(1). It recommended a four-level enhancement because petitioner was the organizer or leader of a criminal activity involving five or more participants, U.S.S.G. § 3B1.1(a), and a two-level enhancement for obstruction of justice based on evidence that petitioner offered bribes to witnesses, U.S.S.G. § 3C1.1. This resulted in an adjusted offense level of 44, which was reduced to 43

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[1] Renumbered Counts One and Four were subsequently dismissed on the government's motion.

(the highest level on the sentencing table, U.S.S.G. Ch. 5, Pt. A n.2).

In written objections to the PSR, petitioner challenged, *inter alia*, the drug amounts attributed to him on the basis of relevant conduct, but affirmatively stated that he "should be held responsible for 46 kilograms of cocaine, which is the combined amount of the two importations of which [petitioner] was convicted and for which he could be held responsible."[2] Petitioner's Objections to PSR at 2; see also *id.* at 3, 8, 11. He further stated that "[t]he government must establish drug quantities by a preponderance of the evidence." *Id.* at 9; *id.* at 12 (arguing that "preponderance" standard applies to role in the offense enhancement).

At the sentencing hearing on March 10, 2000, petitioner again conceded, repeatedly, that 46 kilograms of cocaine were properly attributable to him. Trial Tr. 2968, 2971, 2972. The district court found an additional 217 kilograms attributable to petitioner as relevant conduct, over petitioner's objections, for a total of 263 kilograms (which did not affect the base offense level of 38 calculated by the PSR). *Id.* at 2951-2958.

Following petitioner's argument that the clear and convincing standard of proof applied because of the significant effect of the drug quantities on his sentence, the district court noted that the evidence easily met the clear and convincing standard, but held that the pre-

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[2] The PSR stated that ten of the 30 kilograms from the February 2nd shipment belonged to petitioner, although the trial testimony was that 20 kilograms belonged to petitioner. PSR ¶ 48. Since the government made no objection to that portion of the PSR in the district court, the government assumed on appeal that petitioner was responsible for ten kilograms of the February 2nd shipment. Adding ten kilograms to the 36 kilograms from the February 10th shipment totals 46 kilograms.

ponderance standard in fact applied. Trial Tr. at 2957-2958. Indeed, the court stated that the evidence demonstrated that the court's drug quantity findings were "the most conservative view of what was going on in this case." *Ibid.*

To the resulting offense level of 38, the district court declined to apply the PSR's recommended two-level enhancement for obstruction of justice, but did apply a two-level enhancement for use of a firearm, U.S.S.G. § 2D1.1(b)(1), and a four-level enhancement for leadership role in the offense, resulting in an adjusted offense level of 44 (again necessarily reduced to level 43). The court assigned petitioner a criminal history category of I, which, together with the offense level, yielded a Guidelines' sentence of life imprisonment. The court denied petitioner's downward departure motion and sentenced petitioner to concurrent terms of life imprisonment and five years' supervised release on each count of conviction and imposed a fine of $250,000 and a special assessment of $200. Gov't C.A. Br. 16.

4. The court of appeals affirmed in a per curiam opinion. 1 Pet. App. 23-31. Although petitioner raised numerous issues on appeal, the court concluded that only three warranted brief discussion. *Id.* at 25. First, the court found that misrepresentations made by government agents in order to protect the identity of a confidential informant during certain grand jury proceedings and petitioner's extradition proceedings were "not material."[3] *Id.* at 27. The court explained

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[3] The court of appeals noted that petitioner had not clearly demonstrated that the government misrepresentations at issue were made before the actual grand jury that indicted him, a question the court did not reach because petitioner was not, in any case, entitled to relief. 1 Pet. App. 25 n.1.

that "the informant's existence, identity, and participation appear to have played no significant roles in the decisions to indict, extradite, and convict [petitioner]." *Ibid.*

Second, the court rejected petitioner's argument that the district court's instruction to the then-deadlocked jurors to reconsider their views in light of the opinions of their fellow jurors, a modification of the charge given in *Allen* v. *United States*, *supra*, was impermissibly coercive. 1 Pet. App. 28. The court based its ruling on its consideration of the "totality of the circumstances" and further noted that "the fact that [petitioner's] jury failed to reach a verdict with respect to two of six counts after the *Allen* charge was given also demonstrates that the jury was not unduly coerced into reaching a verdict by the charge." *Ibid.*

Finally, with respect to petitioner's sentences on the drug counts, the court of appeals recognized that the district court erred under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), by sentencing petitioner to life sentences based on quantities of drugs that were not alleged in the indictment or submitted to the jury. 1 Pet. App. 29-30. The court of appeals held that the district court's error did not require reversal, however, "because the undisputed evidence offered at trial with respect to drug quantities was overwhelming and more than sufficient to support [petitioner's] concurrent life sentences." *Id.* at 30-31. The court did not reach the issue whether the error was subject to "preserved error review or plain error review" because, according to the court, "the result in this case is the same under either standard of review." *Id.* at 30 n.5.

DISCUSSION

1. a. Petitioner contends (Pet. 3-30) that the life sentences imposed on each drug count are unconstitutional because they were increased beyond the ordinary statutory maximum based on the amount of cocaine involved in the offense, a fact that was not alleged in the indictment or submitted to the jury for determination beyond a reasonable doubt. See 1 Pet. App. 29-30 & n.4. This issue is essentially the same as that presented in *United States* v. *Cotton*, No. 01-687 (to be argued Apr. 15, 2002). Accordingly, the petition in this case should be held pending the Court's decision in *Cotton* and then disposed of as appropriate in light of that decision.[4]

b. Petitioner also contends (Pet. 21-23) that his sentences were unlawful under *Apprendi* because the district court, rather than the jury, made the drug quantity determination that was used to calculate his sentencing range under the Sentencing Guidelines. That claim merits no further review.

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[4] Petitioner's argument (Pet. 23-27) that the court of appeals erred in considering statements made by defense counsel at sentencing about the quantity of cocaine established by the evidence at trial plainly lacks merit. The court explicitly discussed the testimony of "cooperating government witness David Nash" that "he retrieved 30 kilograms of cocaine on February 2 on [petitioner's] instructions," and that "cooperating witness Wade Lalla testified that he took possession of 36 kilograms of cocaine on February 10 pursuant to [petitioner's] instructions," before even mentioning defense counsel's concession at sentencing. 1 Pet. App. 31. And the court rested its conclusion that the "undisputed evidence offered at trial with respect to drug quantities was overwhelming," *id.* at 30, not on counsel's statements, but on the testimony it had described, *id.* at 31 ("In light of this evidence with respect to the two dates at issue * * *.").

This Court has upheld the use and operation of the Sentencing Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and has made clear that, so long as the statutory minimum and maximum sentences are observed, it is constitutionally permissible for the Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998) (Guidelines "instruct the judge * * * to determine" the type and quantity of drugs for which a defendant is accountable "and then to impose a sentence that varies depending upon amount and kind"). *Apprendi* did not hold otherwise. See *Apprendi*, 530 U.S. at 497 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.") (citing *Edwards*, 523 U.S. at 515).

The Sentencing Guidelines simply "channel the sentencing discretion of the district courts and * * * make mandatory the consideration of factors" that courts have always had discretion to consider in imposing a sentence up to the statutory maximum. *Witte* v. *United States*, 515 U.S. 389, 400-404 (1995); see *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam). A district court retains the authority to "depart from the applicable Guideline range if 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Koon* v. *United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)). Because the Guidelines leave the sentencing court with significant discretion to impose a

sentence within the statutory range, and because specific offense characteristics and sentencing adjustments under the Guidelines cannot increase the statutory maximum penalty for a criminal offense, *Apprendi* does not support a challenge to the constitutionality of the Guidelines. See Sentencing Guidelines § 5G1.1; *Edwards*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines").

The courts of appeals have consistently rejected efforts to apply *Apprendi* to findings under the Sentencing Guidelines. See, *e.g.*, *United States* v. *DeSumma*, 272 F.3d 176, 181 (3d Cir. 2001); *In re Sealed Case*, 246 F.3d 696, 698-699 (D.C. Cir. 2001); *United States* v. *Garcia*, 240 F.3d 180, 184 (2d Cir.), cert. denied, 121 S. Ct. 2615 (2001); *United States* v. *Heckard*, 238 F.3d 1222, 1235-1236 (10th Cir. 2001); *United States* v. *Baltas*, 236 F.3d 27, 40-41 (1st Cir.), cert. denied, 532 U.S. 1030 (2001); *United States* v. *Kinter*, 235 F.3d 192, 198-202 (4th Cir. 2000), cert. denied, 532 U.S. 937 (2001); *United States* v. *Munoz*, 233 F.3d 410, 413-414 (6th Cir. 2000); *United States* v. *Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000), cert. denied, 122 S. Ct. 552 (2001); *United States* v. *Chavez*, 230 F.3d 1089, 1090 (8th Cir. 2000); *United States* v. *Doggett*, 230 F.3d 160, 166 (5th Cir. 2000), cert. denied, 531 U.S. 1177 (2001); *United States* v. *Hernandez-Guardado*, 228 F.3d 1017, 1024-1027 (9th Cir. 2000); *Hernandez* v. *United States*, 226 F.3d 839, 841-842 (7th Cir. 2000). Review by this Court is therefore not warranted.[5]

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[5] In *Harris* v. *United States*, No. 00-10666, this Court granted review to decide whether brandishing a firearm, which results in an increased mandatory minimum sentence under 18 U.S.C. 924(c)(1)(A) (1994 & Supp. V 1999), must be charged in an indict-

2. Finally, petitioner contends (Pet. 28-30) that the district court's instruction to the jurors that they should reconsider their opinions in the light of the views of their fellow jurors, a modification of the charge in *Allen* v. *United States*, 164 U.S. 492 (1896), was impermissibly coercive. Because that contention, which has already been rejected by the court of appeals after full consideration, manifestly does not warrant this Court's review, the government waives its right to respond to that claim unless requested to do so by the Court.

CONCLUSION

With respect to petitioner's claim that his life sentences constitute reversible error under *Apprendi* because they were each increased beyond the ordinary statutory maximums in the absence of allegations in the indictment or jury findings as to the specific quantities of drugs involved in the offenses, the petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Cotton*, No. 01-687, and then disposed of accordingly. In all other respects, the petition should be denied.

Respectfully submitted.

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ment and proved beyond a reasonable doubt. The features of the Guidelines discussed in the text differentiate the constitutional question in *Harris* from any constitutional challenge to the Guidelines. This case therefore need not be held for *Harris*.